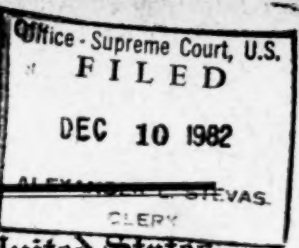


82-973

No.



In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PREDRAG STEVIC

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTION PRESENTED

Whether the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 4a-25a) is reported at 678 F.2d 401. The order of the court of appeals denying rehearing (App. A, *infra*, 1a-3a) is not reported. The decisions of the Board of Immigration Appeals (App. D, *infra*, 27a-31a; App. E, *infra*, 32a-36a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 26a) was entered on May 5, 1982, and a peti-

tion for rehearing was denied on July 29, 1982 (App. A, *infra*, 1a-3a). On October 22, 1982, Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including December 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. (Supp. V) 1253(h) (1) provides:

The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. Respondent is a 32-year old native and citizen of Yugoslavia. He entered the United States on June 8, 1976, as a nonimmigrant visitor authorized to remain until July 25, 1976. Because he stayed in this country beyond that date without permission, deportation proceedings were instituted against him in November 1976. At the deportation hearing, respondent admitted deportability and requested and was granted the privilege of voluntarily departing the United States by February 16, 1977. Respondent designated Yugoslavia as the country to which he wished to be deported. App. B, *infra*, 5a-6a; R. 179, 182, 184-185.¹

Respondent did not leave this country by February 16, 1977. Rather, in January 1977, he married a

¹ "R." refers to the certified administrative record in the court of appeals.

United States citizen, who filed a visa petition on his behalf. The Immigration and Naturalization Service approved the visa petition on April 5, 1977. Five days later, however, respondent's wife was killed in an automobile accident, which automatically revoked the INS' approval of the visa petition. See 8 C.F.R. 205.1(a)(2). Respondent requested the district director of the INS to reinstate the approval, but that request was denied on August 11, 1977, and respondent was ordered to surrender for deportation. App. B, *infra*, 6a-7a; R. 159-160.

2. Instead of surrendering or seeking review of the district director's decision, respondent moved to reopen his deportation proceedings in order to apply for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h).² Respondent alleged that he feared persecution and imprisonment if he were returned to Yugoslavia because of his friendship with members of, and assistance in the work of, Ravna Gora, an anticommunist organization, and because his father-in-law, who was a member of Ravna Gora, had been imprisoned in Yugoslavia on account of his anticommunist activities when he visited there as a tourist in 1974. Respondent submitted his affidavit in support

² In 1977, when respondent filed his first motion to reopen, 8 U.S.C. 1253(h) provided:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

The section was amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.* See pages 17-18 & note 19, *infra*.

of these allegations. App. B, *infra*, 7a-8a; R. 156.³ Respondent explained that he had not requested withholding of deportation at his deportation hearing, and had designated Yugoslavia as the country to which he wished to be deported at that time, because he had not become involved in anticommunist activities until after his marriage, which occurred after he had been found deportable.⁴

On October 17, 1979, an immigration judge denied respondent's motion to reopen his deportation proceedings. Characterizing respondent's affidavit as self-serving and conclusory, the judge held that respondent had failed to provide any substantial evidence that he would be subjected to persecution in Yugoslavia. App. B, *infra*, 8a; R. 150-152.

On January 18, 1980, the Board of Immigration Appeals dismissed respondent's appeal from the immigration judge's decision and denied respondent's motion to reopen (App. E, *infra*, 32a-36a). The Board noted (*id.* at 34a-35a) that "[a] motion to reopen based on a section 243(h) claim of persecution

³ While his motion to reopen was pending before the immigration judge, respondent also applied to the district director for asylum. The district director denied respondent's application on August 1, 1979 (App. B, *infra*, 8a).

⁴ This explanation is not wholly convincing. Respondent subsequently testified that he knew his late wife for six months prior to their marriage in January 1977. Transcript of July 27, 1981 proceedings on respondent's habeas corpus petition, at 42. Accordingly, respondent is likely to have been aware of the circumstances surrounding his future father-in-law's imprisonment in Yugoslavia when he designated that country as the country to which he wished to be deported during his December 1976 deportation proceedings. Nevertheless, respondent did not mention his future wife or her father during his deportation hearing. See R. 176-183.

must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual [alien]." It concluded that respondent had failed to make the required showing because evidence of his membership in Ravna Gora, his father-in-law's incarceration in Yugoslavia, and the conviction in Yugoslavia of an unrelated American citizen associated with an anticommunist organization did not prove that respondent himself would be singled out for persecution if he returned to Yugoslavia. App. E, *infra*, 35a-36a.⁵ Respondent did not seek review of this decision of the Board.

3. In February 1981, the INS again ordered respondent to surrender for deportation. Once again, respondent neither complied nor sought an extension of time. He was arrested by INS officers in Chicago on July 17, 1981, and flown to New York for deportation. While awaiting a connecting flight to Yugoslavia, respondent attempted to escape. Accordingly, he was detained by the INS and his deportation was rescheduled. App. B, *infra*, 8a-9a.

On July 21, 1981, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The district court limited its review to the question whether the district director had abused his discretion by refusing to reinstate approval of the visa petition

⁵ On appeal to the Board of Immigration Appeals, respondent presented a newspaper clipping that reported that another Yugoslav, an American citizen unrelated to respondent, had been sentenced to five years' imprisonment in Yugoslavia. Respondent also submitted a copy of the oath of allegiance that he had taken when he joined an anticommunist organization in February 1977, and a declaration in which he stated his reasons for joining the organization. App. D, *infra*, 28a-29a; R. 148-149.

filed by respondent's late wife on his behalf. The district court concluded there had been no abuse of discretion and denied respondent's petition. App. B, *infra*, 9a.

While detained by the INS, respondent also filed a second motion to reopen his deportation proceedings in order to renew his request for withholding of deportation under Section 243(h). On September 3, 1981, the Board denied respondent's motion (App. D, *infra*, 27a-31a).⁶ The Board observed that although the basis for respondent's second motion to reopen—that he would be persecuted in Yugoslavia because of his associations with the Ravna Gora organization—was identical to that of his prior motion to reopen, respondent had made no showing that the evidence submitted in support of his second motion was unavailable to him and could not have been discovered or presented at a former hearing or that conditions in Yugoslavia had changed substantially since the earlier motion (*id.* at 30a). See 8 C.F.R. 3.2; *Kashani v. INS*, 547 F.2d 376, 380 (7th Cir. 1977).⁷

In addition, the Board held that respondent had failed to make a *prima facie* showing that he would be singled out for persecution if he were deported to Yugoslavia. App. D, *infra*, 31a. The Board noted

⁶ A motion to reopen is addressed to the immigration judge if the outstanding order of deportation has not been appealed. 8 C.F.R. 103.5 and 242.22. However, where, as here, the deportation order has been upheld by the Board, the Board retains jurisdiction to rule on the motion. 8 C.F.R. 3.2 and 3.8.

⁷ In support of respondent's second motion to reopen, he submitted various articles describing the political conditions in Yugoslavia in general and several affidavits of individual Yugoslavs who averred that respondent would be imprisoned if he returned to Yugoslavia. R. 27-139.

(*ibid.*) that "[a] motion to reopen based upon a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual." The Board concluded that respondent had failed to make the required showing because the journalistic articles submitted by respondent (see note 7, *supra*) were "of a general nature, referring to political conditions in Yugoslavia, but not specifically relating to respondent," and the affidavits and petitions submitted by individual Yugoslavs (see *ibid.*) "express an opinion [that respondent will be imprisoned if he returns to Yugoslavia] but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in Yugoslavia." App. D, *infra*, 31a.⁸

4. In a consolidated proceeding in the court of appeals, respondent appealed the district court's denial of his habeas petition and sought review of the Board's most recent denial of his motion to reopen. The court of appeals upheld the district court's denial of respondent's petition (App. B, *infra*, 10a-11a). However, it reversed the Board's denial of respondent's motion to reopen, concluding that the Board had applied too stringent a standard in evaluating respondent's claim of persecution in support of his request for withholding of deportation (*id.* at 11a-25a).

⁸ Respondent also had claimed that if he returned to his home town, Gnjlane, Yugoslavia, he, as a Serbian, would be killed by the Albanians, who constituted a majority in the province and were attempting to secede from Yugoslavia. The Board rejected this claim as well, finding that "there is nothing to stop the respondent from going to another town in Yugoslavia should he feel threatened in his hometown. A respondent is deported to [a] country, not a city or province." App. D, *infra*, 31a.

While acknowledging that "the matter is hardly free from doubt" (App. B, *infra*, 12a), the court of appeals held that the enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, represented the culmination of a process, which had begun with the United States' accession in 1968 to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 *et seq.*, T.I.A.S. No. 6577, of modifying the standard applicable to requests for relief under Section 243(h). App. B, *infra*, 21a. In the court's view (*id.* at 14a), the "'well-founded fear of persecution'" language contained in the Protocol "seems considerably more generous than the 'clear probability' test applied under Section 243(h)." Accordingly, without providing any additional guidance concerning the content of the new standard,⁹ the court concluded (App. B, *infra*, 23a) that "under Section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution." It remanded the case to the Board for a "plenary hearing under the legal standards established by the Protocol." App. B, *infra*, 25a (footnote omitted); App. C, *infra*, 26a.

⁹ The court expressly left the formulation of an appropriate standard for development on an ad hoc case-by-case basis (App. B, *infra*, 24a):

It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. It emphasizes the fear of the applicant as well as the reasonableness of that fear. Its further development must await concrete factual situations as they arise. That development can be informed by traditional indices of legislative intent, by the [Office of the United Nations High Commissioner for Refugees,] *Handbook [on Procedures and Criteria for Determining Refugee Status (Geneva 1979)]* and by experience.

REASONS FOR GRANTING THE PETITION

The decision below squarely conflicts with a recent decision of another court of appeals concerning the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation. In *Rejaie v. INS*, 691 F.2d 139 (1982) (App. F, *infra*, 37a-54a), the Third Circuit correctly held that neither the United States' accession to the United Nations Protocol in 1968 nor the enactment of the Refugee Act of 1980 altered the standard applicable to claims for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. (Supp. V) 1253(h). Shortly thereafter, the Sixth Circuit rendered a decision adopting the position of the court below, without even alluding to the Third Circuit's decision to the contrary.

Resolution of the question on which these courts of appeals have differed is essential, in view of the need for a uniform application of the Nation's immigration laws. In addition, the decision below, if permitted to stand, will impose a substantial administrative burden on the Board and the INS. The court of appeals' ruling renders the more than 9,000 applications for asylum or withholding of deportation that have been denied since the passage of the Refugee Act of 1980 subject to challenge on motions to reopen and clouds the adjudication of the thousands of such cases now undergoing initial administrative review.¹⁰

¹⁰ Withholding of deportation relief under Section 243(h) simply prohibits the government from returning the alien to the country of persecution, whereas an alien who is granted asylum and thereafter is physically present in this country for one year is eligible to apply for permanent resident status. See 8 U.S.C. (Supp. V) 1159(b). Although

1. There is a clear conflict among the courts of appeals concerning the question presented by this case. In *Rejaie v. INS*, 691 F.2d 139 (1982) (App. F, *infra*, 37a-54a), the Third Circuit held that there is no practical difference between the phrases "clear probability of persecution" and "well-founded fear of persecution" and therefore that the standard applicable to claims for withholding of deportation under Section 243(h) was not affected by the United States' accession to the Protocol in 1968 or the passage of the Refugee Act of 1980. App. F, *infra*, 45a-50a. In so holding, the court expressly rejected the reasoning, as well as the conclusion, of the Second Circuit in this case. *Id.* at 50a-54a.¹¹

asylum relief is discretionary under the Refugee Act of 1980, whereas withholding relief under Section 243(h) is mandatory for an eligible alien, the standards for eligibility for the two types of relief are identical. See *In re McMullen*, 17 I. & N. Dec. 542, 544 (BIA 1980), petition for review granted on other grounds, 658 F.2d 1312 (9th Cir. 1981); 8 U.S.C. (Supp. V) 1158(a); 8 C.F.R. 208.5. In addition, asylum requests that are filed with the immigration court "shall also be considered as requests for withholding exclusion or deportation pursuant to Section 243(h) of the Act." 8 C.F.R. 208.3(b). Accordingly, the decision in this case will govern applications for asylum as well as requests for withholding under Section 243(h).

¹¹ In particular, the Third Circuit identified the following errors made by the court below (App. F, *infra*, 52a):

First, it attributed a stringency to the phrase "clear probability" that was not consistent with its own observation in *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), that, under the "clear probability" standard, "[i]n order to forestall deportation the aliens must show some evidence indicating they would be subject to persecution," a formulation that closely approximates the [*In re Dunar*, 14 I. & N. Dec. 310 (BIA 1973)] definition of

One month later, the Sixth Circuit, in a *per curiam* opinion containing virtually no analysis, adopted the position espoused by the court below. In *Reyes v. INS*, No. 81-3157 (Nov. 18, 1982), slip op. 4, the court quoted from the Second Circuit's decision and concluded:

Since the Board applied the more stringent clear-probability test, the holding cannot stand. It is admitted that there is some evidence that Reyes may be subject to persecution. All the Board held was that she had not shown, by a clear probability, that she would specifically be subject to it. Since something less than that showing is now required, we find that the Board erred.^[12]

Thus, the courts of appeals are in disagreement concerning the standard an alien must meet in order to avoid deportation under Section 243(h). In view of the significant consequences of the determination of a withholding of deportation or asylum claim, that determination should not depend upon the circuit in which the applicant is located. Accordingly, this Court should resolve the conflict.

2. The decision below, if permitted to stand, will impose a substantial administrative burden on the

"well founded fear" as "realistic likelihood of persecution." 14 I. & N. Dec. at 319. Second, the court failed to appreciate the caselaw consensus, discussed *supra*, that the two standards were equivalent. Third, the court apparently misapprehended the legislative history of the 1968 accession to the Protocol and of the Refugee Act.

¹² *Rejaie v. INS*, *supra*, was rendered subsequent to oral argument in *Reyes*, but prior to the decision in that case. Although the INS supplied the Sixth Circuit with a copy of the *Rejaie* decision, that court's opinion does not mention the Third Circuit's ruling.

Board and the Service. The INS estimates that, since the enactment of the Refugee Act of 1980, more than 9,000 applications for asylum or withholding of deportation have been denied. The court of appeals' decision, which holds that the wrong standard was applied in evaluating the evidence of persecution presented in those cases, renders all of them subject to attack on motions to reopen. To be sure, not all of these applications were made in the Second Circuit. Nevertheless, as the Sixth Circuit's decision in *Reyes* makes abundantly clear, the impact of the decision below will not be limited to the Second Circuit. Rather, aliens nationwide, anxious to remain in this country by any means possible, can be expected to seize on the decision below in an attempt, at the least, to delay their inevitable deportation. Indeed, we are advised that the bulk of the asylum and withholding applications now before the Board contain requests for a remand or reconsideration in view of the decision below.¹³

Moreover, the court of appeals' decision clouds the adjudication of the thousands of withholding and asylum cases that are currently undergoing initial administrative evaluation and review.¹⁴ So long as the standard for assessing these claims remains unresolved, the number of cases that may require reconsideration in the future will continue to increase.

¹³ The Board of Immigration Appeals estimates that in fiscal year 1980 it addressed 150 asylum or withholding of deportation issues; in FY 1981 it addressed more than 400 such issues; and in FY 1982 it addressed nearly 550.

¹⁴ There are more than 120,000 applications for asylum pending before INS district directors and more than 12,000 asylum/withholding applications pending before immigration judges.

These administrative problems are exacerbated by the fact that the Second Circuit struck down the "clear probability" standard but refused to provide any guidance concerning what it would consider to be an appropriate standard (see page 8 & note 9, *supra*). Thus, even if the Board and the INS should reconsider and evaluate all post-Refugee Act claims in view of the decision below, there is no assurance that such an attempt, applying "a more generous standard than the 'clear probability' test" (App. B, *infra*, 15a), would satisfy the Second Circuit. In these circumstances, this Court's intervention is necessary in order to enable the government to administer the immigration laws efficiently and fairly.

3. Finally, the decision below is manifestly incorrect. The alien has always had the burden of proving eligibility for withholding of deportation on the ground that he would be subject to political persecution in the country of deportation.¹⁵ Specifically, both the courts and the Board have held that an alien is entitled to relief under Section 243(h) only if he can "prove that there is a clear probability that he will be subjected to persecution if deported." *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Shkukani v. INS*, 435 F.2d 1378, 1380 (8th Cir.), cert. denied, 403 U.S. 920 (1971); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967). Hence, an alien is required to show by objective evi-

¹⁵ 8 C.F.R. 242.17(c) provides in pertinent part:

The [alien] has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed.

See also 8 C.F.R. 208.5.

dence that he is somehow different from others of his nationality who reside in his native land and that he would be singled out for persecution if returned there. See *In re Surzycki*, 13 I. & N. Dec. 261, 262-263 (BIA 1969); *In re Joseph*, 13 I. & N. Dec. 70, 71-72 (BIA 1968).¹⁶ The history of both the United States' accession to the United Nations Protocol and the enactment of the Refugee Act of 1980 makes clear that Congress intended neither of those events to alter this standard.

a. In 1968, the Senate gave its advice and consent to the United States' accession to the Protocol, thereby agreeing that this country would not return a "refugee," defined as a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," to the country of persecution.¹⁷

¹⁶ Contrary to the suggestion of the court below (App. B, *infra*, 15a-16a), the "clear probability" test was first enunciated by the courts (see *Lena v. INS*, *supra*), not by the BIA.

¹⁷ The Protocol provides that all parties to it will undertake to apply Articles 2 through 34 of the 1951 Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. See 19 U.S.T. 6225. (The United States is not a party to the Convention itself.) Article 33.1 of the Convention provides (19 U.S.T. 6276) that "[n]o Contracting State shall expel or return * * * a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Article 1 of the Convention, as modified by the Protocol, defines a "refugee" as one who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and

The Senate action was based on the express understanding that accession to the Protocol would neither alter nor enlarge the substance of our immigration laws; rather, accession to the Protocol was intended as a symbol and as encouragement to other nations to treat refugees within their borders in the same salutary manner in which the United States already dealt with those within its territory. See S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4, 6, 7, 10 (1968); S. Exec. Doc. K, 90th Cong., 2d Sess. III, VIII (1968). Specifically, Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the United States Department of State, assured the Senate Foreign Relations Committee that

accession does not in any sense commit the Contracting State to enlarge its immigration measures for refugees. * * * The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with [the asylum concept set forth in the Protocol]. The Attorney General will be able to administer such provisions in conformity with the Protocol, without amendment of the Act.

S. Exec. Rep. No. 14, *supra*, at 6. In addition, the President and the Secretary of State advised that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." S. Exec. Doc. K, *supra*, at III, VII.

being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

See 19 U.S.T. 6261.

In view of this unequivocal evidence of legislative intent, both the courts and the Board have held that the "well-founded fear" language contained in the Protocol represented no change from the preexisting "clear probability" formulation. See *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977); *In re Dunar*, 14 I. & N. Dec. 310 (BIA 1973). See also *Pierre v. United States*, 547 F.2d 1281, 1288 (5th Cir.), vacated and remanded on other grounds, 434 U.S. 962 (1977); *Ming v. Marks*, 367 F. Supp. 673, 677-679 (S.D.N.Y. 1973), aff'd, 505 F.2d 1170 (2d Cir. 1974). Indeed, between 1968 and 1980 the phrases "clear probability of persecution" and "well-founded fear of persecution" were used interchangeably to describe the objective showing required of an alien seeking withholding of deportation under Section 243(h).¹⁸

¹⁸ See *Fleurinor v. INS*, 585 F.2d 129, 132, 134 (5th Cir. 1978) ("well-founded fear" used by immigration judge; "probable persecution" used by court); *Martineau v. INS*, 556 F.2d 306, 307 (5th Cir. 1977) ("clear probability" and "'well-founded fear'"); *Henry v. INS*, 552 F.2d 130, 131 (5th Cir. 1977) ("probable persecution" and "reason to fear persecution"); *Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977) ("well-founded fear"); *Kashani v. INS*, supra, 547 F.2d at 378-379 ("well-founded fear" and "clear probability"); *Zamora v. INS*, 534 F.2d 1055, 1058 (2d Cir. 1976) ("likelihood of persecution" used by court; "'well-founded fear'" used by Board); *Cisternas-Estay v. INS*, 531 F.2d 155, 159 (3d Cir.), cert. denied, 429 U.S. 853 (1976) ("clear probability"); *Daniel v. INS*, 528 F.2d 1278, 1279 (5th Cir. 1976) ("probability of persecution"); *Paul v. INS*, 521 F.2d 194, 200 n.11 (5th Cir. 1975) ("'well-founded'" fear of persecution used by Board); *In re Williams*, 16 I. & N. Dec. 697, 700-701 (BIA 1979) ("well-founded fear," "probable persecution" and "likelihood of persecution"); *In re Chumplitazi*, 16 I. & N. Dec. 629, 633 (BIA 1978) ("well-founded fear" and "clear probability"); *In re*

b. The legislative history of the Refugee Act of 1980 makes equally clear that that legislation also was not intended to alter the standard applicable to requests for withholding of deportation under Section 243(h). The Act first defines the term "refugee," for purposes of the Immigration and Nationality Act, to include "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *." 8 U.S.C. (Supp. V) 1101(42)(A). Both the House and Senate reports indicate that this definition was included simply to conform the language of the Act to that of the Protocol. H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 9 (1979); S. Rep. No. 96-256, 96th Cong., 1st Sess. 4 (1979).

The Refugee Act also modified Section 243(h) to require the Attorney General to withhold deportation if an alien can show that his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group,

Francois, 15 I. & N. Dec. 534, 539 (BIA 1975) ("well-founded" fear); *In re Chukumerije*, 15 I. & N. Dec. 520, 522 (BIA 1975) ("well-founded fear"); *In re Mladineo*, 14 I. & N. Dec. 591, 592 (BIA 1974) ("well-founded" fear); *In re Maccaud*, 14 I. & N. Dec. 429, 434 (BIA 1973) ("reasonable fear" and "well-founded fear"); *In re Bohmwald*, 14 I. & N. Dec. 408, 409 (BIA 1973) ("well-founded fear").

or political opinion.”¹⁹ Like the new definition of “refugee,” the modification of Section 243(h) was effected solely for the sake of clarity—in order to conform its language more closely to that of the Protocol. Indeed, the drafters of the modification of Section 243(h) specifically noted that the standards that the Board and the courts had been applying under the prior formulation of Section 243(h) were fully consistent with the modification:

Withholding of Deportation—Related to Article 33 [the section of the Protocol that prohibits the expulsion or return of refugees] is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney

¹⁹ The Section now reads (8 U.S.C. (Supp. V) 1253 (h) (1)):

The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Compare the prior version set forth at note 2, *supra*.

General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. * * *

As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements.

H.R. Rep. No. 96-608, *supra*, at 18 (emphasis added).²⁰ See also S. Rep. No. 96-256, *supra*, at 9 ("[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees").

Cognizant of Congress' intent not to alter the standard for relief under Section 243(h) by enactment of the Refugee Act, the Board, since passage of that legislation, has continued to use interchangeably the phrases "clear probability" and "well-founded fear" to describe that standard. See, e.g., *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA June 30, 1981), slip op. 6-7 ("clear probability" and "well-founded fear"); *In re Lam*, Interim Dec. No. 2857 (BIA Mar. 24, 1981), slip op. 3-5 ("clear probability" used by immigration judge; "well-founded fear" used by the Board). As the Third Circuit correctly observed in *Rejaie v. INS* (App. F, *infra*, 50a), "[u]nder this analysis the Board takes into consideration an alien's apprehensions of persecution, but also requires him to produce objective evidence which demonstrates the realistic likelihood that he, or a class to which he

²⁰ The House's modification of Section 243(h) was adopted by the Conference Committee. S. Rep. No. 96-590, 96th Cong., 2d Sess. 20 (1980).

belongs, will be persecuted. Generalized, undocumented fears of persecution or political upheaval which affect a country's general populace are insufficient bases for withholding deportation under § 243(h)." See *In re Martinez-Romero*, *supra*, slip op. 6-7.

At least in practice, therefore, the terms "well-founded fear" and "clear probability" are equivalent. Accordingly, by holding that the Refugee Act of 1980 requires withholding of deportation under Section 243(h) upon a showing "far short of a 'clear probability' that an individual will be singled out for persecution" (App. B, *infra*, 23a), the court of appeals has significantly liberalized the standard by which aliens' claims are to be assessed. In so doing, the court below has worked a fundamental change in the substance of our immigration laws—a result that is in direct contravention of the intent underlying the United States' accession to the United Nations Protocol in 1968 and the enactment of the Refugee Act of 1980.²¹ Review by this Court is warranted for this reason as well.

²¹ In connection with its recent consideration of the proposed Immigration Reform and Control Act of 1982, the House reiterated the congressional understanding that the 1968 accession to the Protocol did not expand the substantive rights of aliens (H.R. Rep. No. 97-890, 97th Cong., 2d Sess. 51 (1982) (emphasis added)):

By accession to the Protocol the United States agreed not to deport a refugee "to frontiers or [*sic*] territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion." *Some question has arisen as to whether the United States, by agreeing to the Protocol, intended to expand or modify the rights of aliens seeking asylum in the United States. The Committee is convinced that nothing in present law, nor in*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1982

[the proposed legislation], should be construed as providing less protection than the Protocol. That is, *the Committee views the Protocol as creating no substantive or procedural rights not already existing under current immigration law or under the law as modified by the Committee Amendment. The Committee thus agrees with the holding in Pierre v. United States [, supra,] wherein it is stated that "accession to the Protocol by the United States was neither intended to nor had the effect of substantially altering the statutory immigration scheme."*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 574-575—August Term, 1981

(Argued January 13, 1982 Decided May 5, 1982)

(Rehearing Decided July 29, 1982)

Docket Nos. 81-2288, 81-4162

PREDRAG STEVIC, PETITIONER-APPELLANT

—v.—

CHARLES SAVA, District Director, Immigration and
Naturalization Service, New York Office,
RESPONDENT-APPELLEE

PREDRAG STEVIC, PETITIONER

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

Before:

OAKES, NEWMAN and WINTER,

Circuit Judges.

ON PETITION FOR REHEARING

The INS has petitioned for rehearing, claiming, *inter alia*, that Stevic had not raised the dispositive issue before the BIA and that there was not a proper opportunity to brief that issue before us.

We have reviewed the briefs and the transcript of oral argument and find that prior to this petition, the INS raised no issue as to exhaustion or waiver in the proceedings before the BIA. During oral argument, counsel for the INS twice stated that if the Refugee Act of 1980 changed the legal standard, the matter ought to be remanded to the BIA for further consideration.¹ There is not even a hint of a claim that

¹ JUDGE WINTER:

* * * *

The summary given us by the petitioner makes it pretty clear that the BIA decision did not recognize, did not show any explicit recognition that the standard may have changed subsequent to the January 1980 decision.

If we were to decide that the standard has changed, wouldn't we then be bound to grant some relief, at least by asking the BIA review the facts here under the new standard?

MR. PATRICK: Your Honor, if the Court were so inclined as to feel that the clear probability of persecution standard, which is used by the BIA on the third page of its decision, is the improper standard, it would seem that there certainly would have to be a reconsideration, at least of the motion to reopen, based on any new standard the Court were to feel existed.

* * * *

JUDGE WINTER: Well, the troubling part of the decision is that they . . . state expressly that he hasn't presented any new evidence that wasn't in their prior decision, when, in effect, there may not have been new evidence, but there were new problems.

MR. PATRICK: Referring to the new statute, you mean in that regard?

JUDGE WINTER: Yes.

MR. PATRICK: The decision is, of course, what is being reviewed here. It has been written and it stands. The Service feels quite secure in its interpretation of the

we should affirm because Stevic had failed to raise the Refugee Act issue before the BIA. We indicate no view as to what result would follow in a case in which such a claim was made.

So far as the opportunity to brief the question is concerned, we note that the petition concedes the issue was raised in this Court by Stevic. Moreover, the oral argument dealt almost exclusively with the effect of the Refugee Act of 1980. Had the INS felt that its briefing of the issue was inadequate, it had ample opportunity to make appropriate motions. This it declined to do. We have, nevertheless, reviewed the materials presented in the petition relevant to the merits of the decision. We find that they were fully considered in our deliberations and previous opinion, to which we adhere.

The petition for rehearing is denied.

law and I am here to represent the Service's position in that regard.

But obviously, with your Honor's hypothetical question, if the Court were to feel that the standard were improper, certainly a reconsideration under the new standard would apparently be the proper step in that regard.

Transcript of Oral Argument before this Court, January 13, 1982, pp. 29-31.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 574-575—August Term, 1981
(Argued January 13, 1982 Decided May 5, 1982)
Docket Nos. 81-2288, 81-4162

PREDRAG STEVIC, PETITIONER-APPELLANT

—v.—

CHARLES SAVA, District Director, Immigration and
Naturalization Service, New York Office,
RESPONDENT-APPELLEE

PREDRAG STEVIC, PETITIONER

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

Before:

OAKES, NEWMAN, and WINTER,
Circuit Judges.

Appeal from an order entered in the United States
District Court for the Southern District of New York
(Whitman Knapp, *Judge*) denying a petition for writ

of habeas corpus, and a petition for review of a decision of the Board of Immigration Appeals denying a motion to reopen deportation proceedings.

The denial of the petition for writ of habeas corpus is affirmed. The denial of the motion to reopen deportation proceedings is reversed and remanded.

WINTER, *Circuit Judge*:

This is a consolidation of (1) an appeal from the dismissal of a petition for a writ of habeas corpus, and (2) a petition for review of a final order of deportation of the Board of Immigration Appeals ("BIA"). The major issue is whether the Refugee Act of 1980 changes the legal standard for aliens seeking political asylum in order to avoid deportation. We hold that it does and reverse the BIA's order denying the motion to reopen.

BACKGROUND

The petitioner-appellant, Predrag Stevic, is a citizen of Yugoslavia. He entered the United States on June 8, 1976, with a visa permitting him to remain until July 25, 1976. The purpose of the trip was to visit his sister who had married a United States citizen and was a permanent resident here. When his visa expired, Stevic neither left nor sought an exten-

sion of time. Deportation proceedings were commenced. A hearing was held on December 16, 1976, before Immigration Judge Anthony D. Petrone. Stevic's counsel neither contested his deportability nor requested political asylum. Rather, Stevic consented to "voluntary departure" within sixty days and designated Yugoslavia as the country to which he desired to be deported. Judge Petrone ordered "voluntary departure" for Stevic on or before February 16, 1977. No appeal was taken. When the time came, Stevic again neither departed nor requested an extension of time.

On January 8, 1977, Stevic married Mirjana Doichin, a United States citizen. Thereafter, she filed a "Petition to Classify Status of Alien Relative for Issuance of Immigration Visa" on Form I-130 ("I-130 Petition") with the Immigration and Naturalization Service ("INS"), the first step in obtaining an "adjustment of status" to lawful permanent residence status.¹ On April 5, 1977, the I-130 Petition was approved by the INS. Five days later, Stevic's wife was killed in an automobile accident. As a result, approval of the I-130 Petition was automatically revoked under 8 C.F.R. § 205.1(a)(2).²

¹ 8 U.S.C. § 1225 provides that once an I-130 Petition is granted, the alien may apply to adjust his status to that of "lawfully admitted for permanent residence" in the United States.

² 8 C.F.R. § 205.1(a)(2) reads in part:

The approval of a[n] [I-130] petition is revoked . . . if any of the following circumstances occur . . . before the decision on his application [for adjustment of status to permanent resident] becomes final:

* * * *

(2) Upon the death of the petitioner. . .

Stevic requested reinstatement of the I-130 Petition on humanitarian grounds pursuant to 8 C.F.R. § 205.1 (a) (3).³ On August 11, 1977, the INS's Chicago District Director denied that request, stating that Stevic had "no immediate relatives or other equity in the United States." This was in part untrue since Stevic's sister was a permanent resident in this country. Stevic was given notice to surrender for deportation on August 24, 1977. He did not seek review of that decision.

Stevic did not surrender for deportation. Instead, he moved to reopen the deportation proceedings for the purpose of filing an application for withholding of deportation to Yugoslavia under Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253(h).⁴ In this motion, Stevic raised for the first time his fear of persecution should he be deported to Yugoslavia. Stevic claimed that, since his

³ 8 C.F.R. § 205.1 (a) (3) reads in part:

The approval of a[n] [I-130] petition is revoked . . . if any of the following circumstances occur . . . before the decision on his application [for adjustment of status to permanent resident] becomes final:

* * * *

(3) Upon the death of the petitioner unless the Attorney General in his discretion determines that for humanitarian reasons revocation would be inappropriate.

⁴ On that date, 8 U.S.C. § 1253(h) read in part:

(h) the Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reasons.

marriage, he had become active in an emigre anti-Communist organization, Ravna Gora. He stated that his wife's father, an American citizen, and also a member of Ravna Gora, was imprisoned while visiting Yugoslavia as a tourist in 1974. According to Stevic's habeas petition, his father-in-law was imprisoned for three years, an experience which caused him to commit suicide upon release. Stevic presented evidence of his own activities in other Serbian emigre organizations and of the hostility of the Yugoslav government to these organizations and their members. While the motion to reopen was pending, Stevic applied to the Chicago District Director for asylum. That application was denied on August 1, 1979. On October 17, 1979, Judge Petrone denied Stevic's motion to reopen. Stevic appealed to the BIA. On January 18, 1980, the BIA dismissed Stevic's appeal, stating:

A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. *See Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). Although the applicant here claims to be eligible for withholding of deportation which was not available at the time of his deportation hearing, he has not presented any evidence which would indicate that he will be singled out for persecution.

Stevic did not appeal this decision.

Stevic was then served with a notice to surrender for deportation on February 24, 1981. Once again, he neither complied nor requested an extension of time. On July 17, 1981, he was apprehended in Chicago and transported to J.F.K. International Airport

in New York for deportation. During a transfer to a connecting flight for Yugoslavia, Stevic attempted to escape and was detained by the INS. Deportation was rescheduled. On July 21, 1981, Stevic petitioned for a writ of habeas corpus in the United States District Court for the Southern District of New York. The District Court, limiting its consideration to whether the August 11, 1977 decision denying humanitarian relief was an abuse of discretion, denied the petition. Stevic appealed.

Stevic also filed a second motion to reopen his deportation proceedings before the BIA. On September 3, 1981, the BIA denied that motion. It stated:

The position of this motion is identical to the prior one; . . . No showing has been made that the submitted information was not available to the respondent prior to this date, nor that conditions in Yugoslavia have substantially changed since he filed the first motion

* * * * *

In addition, we also conclude that the respondent has failed to make out a prima facie showing that he will be singled out for persecution if deported to Yugoslavia. A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. See *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Matter of McMullen*, Interim Decision 2831 (BIA 1981)

Stevic petitions for review of that decision.

The appeal from the District Court and the petition for review of the BIA decision have been consolidated.

APPEAL FROM THE DISTRICT COURT

In his petition for a writ [sic] of habeas corpus,⁵ Stevic challenged the validity of the denial of humanitarian relief by the INS's Chicago District Director on August 11, 1977.

Like the District Court, our review is limited to determining whether that decision is an abuse of discretion or unsupported by substantial evidence. The granting or denying of humanitarian relief is a matter for the exercise of discretion by the Attorney General and his decision may not be overturned by a reviewing court "simply because it may prefer another interpretation" *INS v. Wang*, 450 U.S. 139, 144 (1981).

The District Director's decision is by no means invulnerable, since the statement that Stevic has no immediate relatives in this country is a plain mistake of fact. Stevic's immigration record plainly indicated that his original purpose in entering the United States was to visit his sister, then and now a permanent resident.

Judge Knapp noted the Director's error, but declined to grant relief since no effort was made at the time either to bring the error to the Director's at-

⁵ The District Court had jurisdiction to review the denial of Stevic's request for humanitarian relief by writ of habeas corpus since Stevic's deportability was not at issue therein. *Daneshvar v. Chauvin*, 644 F.2d 1248 (8th Cir. 1981); *United States ex. rel. Panco v. Morris*, 426 F. Supp. 976, 978 n.4 (E.D. Pa. 1977). Final orders of deportation are directly reviewable by this Court under 8 U.S.C. § 1105a. See note 6, *infra*.

tention or to appeal. We also decline to act on the basis of a factual error in a discretionary decision now some four and one-half years old. Stevic has had more than ample opportunity to bring the error to the Director's attention or challenge it before the BIA. Since we cannot say that, but for the Director's prior error, humanitarian relief would have been granted or that such relief is mandatory in light of the true facts, the only legitimate function the writ might serve would be to permit Stevic to file a renewed application to reinstate the I-130 Petition. Stevic, however, has been free to make such an application for years, including the period during which this appeal has been pending, but has not done so. For those reasons, we affirm Judge Knapp.

REVIEW OF THE BIA DECISION

The September 3, 1981 decision of the BIA raises more complex issues.⁶ The BIA considered Stevic's motion to reopen the deportation proceedings as raising essentially the same claims as were disposed of by the denial of his first motion to reopen on January 18, 1980. Stevic argues that, subsequent to the first motion to reopen, but prior to the second, the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), changed the legal standard relating to applications for political asylum. If he is correct, the BIA decision must be reversed.

⁶ Under 8 U.S.C. § 1105a, the BIA decision of September 3, 1981, denying Stevic's motion to reopen, is reviewable as a final order of deportation within the Act. *Foti v. INS*, 375 U.S. 217 (1963); *Giova v. Rosenberg*, 379 U.S. 18 (1964) (per curiam); *Wong Wing Mang v. INS*, 360 F.2d 715 (2d Cir. 1966).

Although the matter is hardly free from doubt, as the ensuing discussion reveals, we agree with Stevic's statutory argument. Since the Refugee Act of 1980 is the end product of an evolutionary process in the law of asylum, it is necessary to trace its origins in detail.

1. Pre-1968 Asylum Law

Before 1968, political asylum was governed by two statutory provisions of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952). The first, which governed deportable aliens already in this country, was Section 243(h), 8 U.S.C. § 1253(h), which read:

The Attorney General is authorized to withhold deportation of any alien . . . to any country in which *in his opinion* the alien *would be subject to persecution* on account of race, religion, or political opinion

(Emphasis supplied).

Under that provision, an alien already in the United States and seeking political asylum to avoid deportation had to make a showing of a "clear probability of persecution" directed at the particular alien. *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967). Objective proof that the applicant would be singled out for persecution by the authorities in the country to which he or she was deported was required.

The second relevant provision, which governed the admission of aliens seeking political asylum who were not in this country, was Section 203(a)(7), 8 U.S.C. § 1153(a)(7), which read:

(a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

(7) Conditional entries shall next be made available by the Attorney General, . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . (A) that (i) because of persecution or *fear of persecution* on account of race, relation [*sic*], or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, . . .

(Emphasis supplied).

Section 203(a)(7) was thus directed at aiding refugees fleeing particular regions and particular kinds of regimes. The legal standard under that section was considerably less stringent than Section 243(h)'s "clear probability" of persecution of a singled-out individual, a fact explicitly recognized by the BIA in its decisions. *Matter of Tan*, 12 I. & N. Dec. 564 (1967). "[F]ear of persecution," under relevant BIA decisions, required only a showing of "good reason" for such fear. *Matter of Ugricic*, 14 I. & N. Dec. 384, 385-386 (1972). See also *Matter of Adamska*, 12 I. & N. Dec. 20[1] (1967).

2. The United National Protocol

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees,

19 U.S.T. 6257, 606 U.N.T.S. 268 ("Protocol"). The Protocol adopted, with certain changes not relevant here, the definition of "refugee" used in the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 ("Convention").⁷ Under the Protocol, a "refugee" is a person who,

owing to a *well-founded fear of being persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality

(Emphasis supplied). No party to the Protocol may, under Article 33 of the Convention,

return . . . a refugee . . . to . . . territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.
...

The language of the Protocol seems considerably more generous than the "clear probability" test applied under Section 243(h). A "well-founded fear of persecution," for example, is closer to Section 203(a) (7)'s "fear of persecution" than to Section 243 (h)'s admittedly restrictive standard. Moreover, the history of the Convention's definition of "refugee" demonstrates that the drafters believed a showing of "good reason" to fear persecution was sufficient to prove one's status as a "refugee." United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39 (1950) (E/1618; E/AC 32/5). That test is identical to the one used by the BIA to describe the applicable

⁷ The United States never acceded to the Convention.

standard under former Section 203(a)(7). *Matter of Ugritic, supra*.

Interpretation of the Protocol is also informed by the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979).⁸ The *Handbook* is a response to requests for guidance as to the Protocol's requirements and is based on the High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject. It, too, supports the view that the Protocol embodies a more generous standard than the "clear probability" test.

Briefly summarized, it states that a "well-founded fear" has subjective as well as objective elements. *Id.* at ¶ 38. The applicant's state of mind is thus relevant, as are conditions in the country of origin, its laws, and experiences of others. *Id.* at ¶ 42-43. The applicant must show "good reason why he individually fears persecution," but a desire "to avoid a situation entailing the risk of persecution" may be enough. *Id.* at ¶ 45. Persecution means a threat to life or freedom. *Id.* at ¶ 51.

Our examination of the Protocol, its language, history and subsequent usage as derived from the *Handbook* leads us to conclude that it is somewhat more generous than the BIA's administrative practice in applying Section 243(h), which has required an applicant for asylum to show a "clear probability" that he or she will be singled out for persecution. The

⁸ The BIA has treated the *Handbook* as a significant source of guidance as to the meaning of the Protocol. *Matter of Rodriguez-Palma [sic]*, Interim Decision No. 2815 (BIA, August 26, 1980).

“clear probability” test had been initially articulated by the BIA as its preferred way of implementing what had been the wholly discretionary authority of Section 243(h). *Matter of Joseph*, 13 I. & N. Dec. 70 (1968); see *Cheng Kai Fu v. INS*, *supra*, 386 F.2d at 753; *Lena v. INS*, *supra*, 379 F.2d at 528. Since Article 33 of the Convention imposes an absolute obligation upon the United States, standards developed in an era of discretionary authority require some adjustment.

3. Asylum Law from 1968 to 1980

In the legislative proceedings leading to the United States accession to the Protocol in 1968, assurances were given by the President and the State Department that existing legislation did not need to be amended in order to comply with the Protocol. S. Exec. K, 90th Cong., 2d Sess. III, VII, VIII; S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 7, 10; see also *Ming v. Marks*, 367 F.Supp. 673, 677-79 (S.D. N.Y. 1973), *aff'd per curiam*, 505 F.2d 1170 (2d Cir. 1974). Nevertheless, the lack of identity between the prior practice under Section 243(h) and what should be expected after accession to the Protocol was at least suggested. The Secretary of State informed the Senate that Article 33 is “comparable” to Section 243(h) and that “it can be implemented within the administrative discretion provided by existing regulations.” S. Exec. K, *supra*, at VIII. The lack of identity was also noted by the BIA, which characterized the legislative history of the accession as indicating that laws relating to deportation of refugees would remain “substantially” unaffected and that any “minor” changes could be handled “administratively.” *Matter of Dunar*, 14 I.&N. Dec. 310, 316 (1973).

Despite this recognition that some administrative changes might be required by the Protocol, the BIA's decision in *Dunar* concluded that the Protocol did not modify the "clear probability" test that it had been using in Section 243(h) proceedings. The BIA's reasoning in *Dunbar* [*sic*] began with the canon of construction disfavoring repeals by implication unless the later treaty is absolutely incompatible with the earlier statute. *Id.* at 314. It also noted the representations made by the Executive Branch to the Senate that existing immigration laws embodied the principles of the Protocol so far as refugees were concerned. *Id.* Turning to language and history, the BIA quoted from the Ad Hoc Committee's report equating a "well-founded fear" with "good reason [to] fear." *Id.* at 319. The quotation was used, however, only to refute the strawman argument that the "well-founded fear" test was exclusively subjective and to show that objective evidence was also relevant. *Id.* at 319. Ignoring that its own case law had consistently differentiated between Section 203(a)(7)'s "good reason" test and Section 243(h)'s "clear probability" requirement, the BIA leapt illogically from the proposition that "good reason" includes objective factors as well as an applicant's subjective beliefs to the conclusion that it was the same test as "clear probability." *Id.* at 319-21. The rest of the *Dunar* opinion reconciles the existence of discretion in the Attorney General under Section 243(h) with the mandatory nature of the Protocol by concluding that the Attorney General had always exercised his discretion to withhold deportation when the requisite legal standard was met. *Id.* at 321-23.

The only Court of Appeals to confront directly the issue of whether the Protocol requires a change in

administrative practice under Section 243(h) was presented with the extravagant claim that the Protocol has shifted the inquiry entirely to an assessment of the applicant's subjective state of mind. *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977). *Kashani* rejected this contention, reasoning that the Protocol's test of a "well-founded fear" must be "more than a matter of [the applicant's] own conjecture." *Id.* The Seventh Circuit also predicted that the "well-founded fear" standard of the Protocol and the "clear probability" standard of the BIA administering Section 243(h) "will in practice converge," *id.* Finally, the Court reconciled the discretionary power of the Attorney General with the mandatory aspect of the Protocol by relying on *Dunar's* assertion that the Attorney General always withheld deportation whenever the "clear probability" test was met. *Id.* The Fifth Circuit continued to refer to the "clear probability" test in *Pierre v. United States*, 547 F.2d 1281, 1289 (5th Cir.), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977), but did so in the context of a parole application pursuant to 8 U.S.C. § 1182 (d)(5), and with emphasis upon the discretionary nature of the Attorney General's decision, *id.* However, in *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977), the Fifth Circuit, remanding a Section 243(h) application for reconsideration, noted that, while the Protocol did not "profoundly" alter American refugee law, United States adherence to the Protocol "reflects or even *augments* the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law." *Id.* at 977 (emphasis added).

4. The Refugee Act of 1980

Against this backdrop, Congress enacted a comprehensive revision of asylum law in the Refugee Act of

1980. The immediate occasion for the legislation appears to have been the large numbers of "boat people" from Southeast Asia and refugees from Cuba, as well as the generalized appreciation that United States refugee policy had to be geared to handle sudden, unpredictable influxes of refugees. Congress seized this opportunity to make a comprehensive revision of immigration laws relating to asylum.

Among the revisions were amendments which did what had not been done when the United States acceded to the Protocol in 1968: the language of the immigration law was explicitly conformed to that of the Protocol, notwithstanding the earlier assurances that statutory changes were not necessary to comply with the Protocol.

Thus, whereas earlier laws contained no definition of "refugee," Section 201(a) of the 1980 Act, 8 U.S.C. § 1101(a) (42) states:

The term 'refugee' means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a *well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion, . . .

(Emphasis supplied). This language conforms to the definition of refugee adopted by the Protocol. *Ante* at 8.

Section 243(h) also underwent major amending in order to conform it to Article 33 of the 1951 Convention as adopted by the Protocol. It now reads:

The Attorney General shall not deport or return any alien to a country if the Attorney General determines that such alien's life or freedom would

be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Another major change was to repeal the prior authority of Section 203(a)(7) for conditional entry of a limited number of refugees and replace it with the broader authority of newly enacted Section 207, 8 U.S.C. § 1157. Finally, Section 208(a) authorized a uniform procedure for those seeking asylum, whether physically present in the United States or at a border or point of entry. 8 U.S.C. § 1158(a). Regulations promulgated by the INS direct that asylum requests made after the institution of deportation proceedings shall "also be considered as requests for withholding . . . deportation pursuant to Section 243(h) of the Act." 8 C.F.R. § 208.3.

The significance of these changes, pertinent to this appeal, is that the adoption of a uniform definition of refugee eliminates the prior distinction between the standard for determining eligibility for a discretionary grant of asylum (formerly authorized by Section 203(a)(7) and currently authorized by Section 207) and the standard for determining eligibility for the mandatory withholding of deportation pursuant to amended Section 243(h).

The legislative history of the Refugee Act of 1980, fairly read, recognizes that the definition of refugee is new and brings United States law into compliance with the Protocol. S. Rep. No. 96-256, 96th Cong., 1st Sess. 4 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 9 (1979). The Senate Report seems to assume, however, that the amendments to Section 243(h) work no major change. S. Rep. No. 96-256 at 9, 17. The House Report is more ambiguous, acknowledging that the BIA and the courts have said that the

protection of Article 33 has always been available under Section 243(h) but insisting that the Article's language be explicitly used "for the sake of clarity." H.R. Rep. No. 96-608 at 18. The Conference Report states that the new Section 243(h)

is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol. The Conferees direct the Attorney General to establish a new uniform asylum procedure under the provisions of this legislation.

H.R. Conf. Rep. No. 96-781, 96th Cong., 2d Sess. 20 (1980).

5. Conclusion

Stevic's final motion to reopen under Section 243(h) was based on the Refugee Act of 1980. The BIA's denial of the motion rested on its implied view that the 1980 Act wrought no changes relevant to Stevic's application. We conclude that the Refugee Act of 1980 completed the process, begun with accession to the Protocol, of modifying the legal test applicable to Section 243(h) applications for relief from deportation. We reverse and remand for a hearing under the new standard.

We make no pretense of following a bright line drawn in the legislative history. Congress was rightly concerned with general issues of policy, and the INS chose not to invite it to address the interpretive problems which would inevitably arise under the new statutory language. Nevertheless, we find meaningful guideposts and read them as indicating that, at least with the passage of the 1980 Act, the "clear probability" test is no longer the applicable guide for administrative practice under Section 243(h).

The 1980 Act thoroughly undercuts the reasoning of *Dunar, supra*. Since the relevant statutory language was extensively overhauled and made to conform to the Protocol, canons of construction relating to repeals by implication are no longer of any relevance. Moreover, the Act eliminated the distinction between aliens seeking to enter as refugees under the old Section 203(a)(7) and deportable aliens already in the country seeking political asylum under the old Section 243(h). Under prior law, the former were subject to the "good reason to fear" test while the latter had to show a "clear probability" that they would be singled out for persecution. *See ante* at 7-8. Since the 1980 Act dictates that a uniform test of "refugee" be applied to all aliens, whether seeking admission under the newly enacted Section 207, or seeking to avoid deportation under amended Section 243(h), the legislative history indicating no major changes cannot alter the inevitable consequence that some change in administrative practice must occur. As to either applicants for asylum or applicants for withholding deportation, a change from the previous dual standard is contemplated. *See Note, The Right of Asylum under United States Law*, 80 Colum. L. Rev. 1125, 1138 n.87 (1980).

We believe Congress' sympathy to the plight of refugees such as the "boat people" is relevant. The general purpose of the Act is to regularize, not hinder, their entry. The Act

reflects one of the oldest themes in America's history—welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns. . . .

S. Rep. No. 96-256 at 1. In the context of that humane attitude, it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than had existed in prior law. Where the choice is between a concededly rigorous standard which would subject some potential asylees to the risk of persecution and a more generous one which tilts toward protection from such risk, the strongly humanitarian rhetoric accompanying the legislation is helpful to interpretation.

More important, Congress left no ambiguity about its intention to conform United States domestic law to the Protocol. That was stated explicitly on every relevant occasion in the legislative history. *See, e.g., ante* at 14. The Conference Report unequivocally directed that Section 243(h) "be construed consistent with the Protocol." H.R. Cong. Rep. No. 96-781 at 20. The definition of "refugee" and the new language of Section 243(h) are based literally upon the Protocol, and the creation of a uniform legal test for refugees is derived directly from it. Finally, the discretionary language "in his opinion" has been eliminated from Section 243(h), thereby rendering the uniform standard mandatory for Section 243(h) relief. *Cf. McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

We believe, therefore, that the Refugee Act of 1980 calls upon courts, in construing the Act, to make an independent judgment as to the meaning of the Protocol. Both the text and the history of that document strongly suggest that asylum may be granted, and, under Section 243(h), deportation must be withheld, upon a showing far short of a "clear probability" that an individual will be singled out for persecution. *See ante* at 12-14. The guidance available in the High Commissioner's *Handbook*, which was published before the enactment of the Refugee Act of

1980, is to a similar effect. Since the *Handbook* was specifically designed to aid governments in interpreting the Protocol, at 2, and has been subsequently relied upon by the BIA in interpreting the revised Section 243(h), *see Matter of Rodriguez-Palma, ante* at note 8, we accord its view considerable weight.

Even when the Section 243(h) authority was discretionary, we held that the "standards employed by the Attorney General in exercising his discretion under Section 243(h) are subject to judicial review." *Sovich v. Esperdy*, 319 F.2d 21, 26 (2d Cir. 1963). After the Protocol imposed a prohibition against return of a refugee to a country where persecution would be threatened and especially after Congress amended Section 243(h) to eliminate discretion and conform the provision to the terms of the Protocol, a reviewing court has a clear responsibility to assure that the non-discretionary exercise of Section 243(h) authority has been performed according to the correct standards of law. While we do not sit to second-guess the merits of the decisions reached under Section 243(h), our obligation to assure observance of correct legal standards under this mandatory provision is to be contrasted with the more limited role of courts in reviewing BIA decisions under grants of discretionary authority, such as the "extreme hardship" provision of Section 244, 8 U.S.C. § 1254(a) (1), *INS v. Wang, supra*.

It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. It emphasizes the fear of the applicant as well as the reasonableness of that fear. Its further development must await concrete factual situations as they arise. That development can be informed by the traditional indices of legislative intent, by the *Handbook* and by experience.

The BIA's denial of Stevic's second motion was based on a legal test which, we hold, is no longer the law. Stevic has alleged a fear of persecution based upon his anti-Communist activities in this country, the general hostility of the Yugoslav government to such activities and the particular fate of his father-in-law. His claim is not so frivolous that it should not be tested in a plenary hearing under the legal standards established by the Protocol.⁹

We reverse and remand for such a hearing.

⁹ To the extent that other changes in statutory language, such as the addition of the words "membership in a particular social group" to Section 243(h), might be helpful to Stevic, he is entitled to be heard on those also. In *Dunar*, the BIA itself recognized that the purpose of Section 243(h), even before its amendment in 1980, was to shield aliens from persecution because they are members of "*dissident or unpopular minority groups*." 14 I.&N. Dec. at 320 (emphasis added). And the BIA noted that the Protocol's "inclusion of the two new classes [nationality and social group] within the ambit of section 243(h) . . . is clearly compatible with the beneficent purposes underlying that provision." *Id.*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Judgment-Filed May 5, 1982]

[Caption omitted]

Petition for review of an order of the Board of Immigration Appeals,

This cause came to be heard on the record of the Immigration and Naturalization Service and was argued by counsel,

UPON CONSIDERATION THEREOF, it is hereby ordered, adjudged and decreed that the order of the Board of Immigration Appeals be and it hereby is reversed and the action remanded to said Board for further proceedings in accordance with the opinion of this court.

IT IS FURTHER ORDERED that the appeal from an order of the United States District Court for the Southern District of New York be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

by /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

APPENDIX D

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

Sep. 3, 1981

File: A21 535 549—New York

In re: PREDRAG *STEVIC*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Ann L. Ritter, Esquire
420 Madison Avenue, Suite 1200
New York, New York 10017

ON BEHALF OF SERVICE:

Gerald S. Hurwitz
Appellate Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2))—Nonimmigrant—
remained longer than permitted

APPLICATION: Reopening

In a decision dated December 16, 1976, the immigration judge found the respondent deportable under

section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), based on his own admissions. At that time the respondent designated Yugoslavia as the country of deportation and was granted 60 days voluntary departure. No appeal was taken from that order.

On January 8, 1977, the respondent married a United States citizen who subsequently filed an immediate relative visa petition on his behalf. The petition was approved on April 5, 1977. On April 10, 1977, the respondent's wife was killed in an automobile accident and on June 13, 1977, the Service revoked the approved visa petition. On August 24, 1977, the respondent filed a motion to reopen the deportation hearing to submit an application for withholding of deportation. His motion alleged that it was not until after his marriage to Mira Doychin that he became actively involved with an anti-communist organization, "Ravna Gora" and he now feared that he would be imprisoned were he deported to Yugoslavia. The respondent further claimed that his father-in-law returned to Yugoslavia as a tourist in 1974 and has been imprisoned there since, due to his involvement with Ravna Gora. The immigration judge denied the motion on October 17, 1979, upon finding that the respondent had failed to establish that there was a clear probability that he would be singled out for persecution. The immigration judge concluded that the affidavit submitted with the motion contained only general, self-serving statements, undocumented by specific evidence.

This Board, in affirming the immigration judge's decision on January 18, 1980, concluded that the submitted evidence did not demonstrate that the respondent himself would be subject to persecution in Yugoslavia. The only material received by the Board at

that time was a copy of the oath which the respondent took upon joining Ravna Gora and a clipping from the Chicago Tribune of February 14, 1973, referring to another Yugoslav who was sentenced to prison in Yugoslavia.

No further legal action was taken by the respondent until after he was apprehended by the Service in Chicago and deportation was attempted. The respondent was detained in New York after engaging in an altercation with his guards while changing planes. It was at this point that the motion to reopen currently before us was submitted.

The main thrust of the respondent's present and prior motion to reopen is that he will be persecuted for his anti-communist activities in the United States if deported to Yugoslavia. In support of his claim, the respondent has currently submitted numerous articles and reports discussing present day political conditions in Yugoslavia; and several petitions and affidavits from members of Serbian anti-communist organizations in New York City and Chicago stating that the respondent would be arrested upon his return to Yugoslavia. The allegation is also made in counsel's brief that if the respondent were to return to his home town of Gnjilane in the province of Kosovo, his life would be in danger due to the Albanian majority residing in that province who are allegedly killing all Serbians in order to gain control of the province and secede from Yugoslavia.

A motion to reopen deportation proceedings will not be granted unless it appears to the Board that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. *See* 8 C.F.R. 3.2. A party seeking reopening must state the new facts which he intends to establish, supported by affidavits

or other evidentiary material. See 8 C.F.R. 3.8; 8 C.F.R. 103.5. The grant or denial of a motion to reopen is itself a discretionary determination with the outcome dependent in part upon the likelihood that the movant will be granted the relief sought if reopening is permitted. See *Matter of Rodriguez*, Interim Decision 2727 (BIA 1979).

In the instant case, the respondent voluntarily named Yugoslavia as the country of deportation, presumably knowing that his future wife's father had been imprisoned there in 1974. When the respondent submitted his first motion to reopen in 1977 the thrust of his argument was that he would be persecuted in Yugoslavia because of his associations with the Ravna Gora organization. The immigration judge denied the motion for lack of specific evidence relating to the respondent and how he would be persecuted. On appeal, the respondent furnished no new documentation. In fact, in the four years since the first motion was filed the respondent failed to submit any corroborating evidence of how he might be singled out for persecution were he to return to Yugoslavia, until after he had been picked up by the Service to be deported.

The position of this motion is identical to the prior one; that the respondent will be persecuted because of his anti-communist activities in the United States. No showing has been made that the submitted information was not available to the respondent prior to this date, nor that conditions in Yugoslavia have substantially changed since he filed the first motion.

Accordingly, we find that the respondent has failed to comply with the provisions of 8 C.F.R. 3.2 in that there has been no showing that the submitted material was not available nor could not have been discovered or presented at a former hearing.

In addition, we also conclude that the respondent has failed to make out a prima facie showing that he will be singled out for persecution if deported to Yugoslavia. A motion to reopen based on a section 243 (h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. See *Cheng Kai Fu v. INS*, 386 F.2d 750 (2 Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Matter of McMullen*, Interim Decision 2831 (BIA 1981).

In the instant case, the many journalistic articles submitted by the respondent are of a general nature, referring to political conditions in Yugoslavia, but not specifically relating to the respondent. The affidavits and petitions contained in the file, while they conclude that the respondent will be imprisoned if he returns to Yugoslavia, do not contain any supporting facts. They express an opinion but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in Yugoslavia.

With regard to the respondent's allegation that he will be persecuted by Albanian ethnics in Gnjilane, we find that there is nothing to stop the respondent from going to another town in Yugoslavia should he feel threatened in his hometown. A respondent is deported to country [*sic*], not a city or province. *Lavdas v. Holland*, 235 F.2d 955 (3 Cir. 1956); *Cantisani v. Holton*, 248 F.2d 737 (7 Cir. 1957).

For the above mentioned reasons, we will deny the respondent's motion.

ORDER: The motion to reopen is denied.

Chairman

APPENDIX E

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

Jan. 18, 1980

File: A21 535 549—Chicago

In re: *PREDRAG STEVIC*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Nathan T. Notkin, Esquire
11 South La Salle Street
Chicago, Illinois 60603

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2)—Nonimmigrant—
remained longer than permitted

APPLICATION: Motion to reopen

The respondent appeals from the October 17, 1979 decision of an immigration judge denying his motion to reopen the deportation proceedings for the purpose of applying for withholding of deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). The appeal will be dismissed.

The adult male respondent is a native and citizen of Yugoslavia who last entered the United States on or about June 8, 1976 as a nonimmigrant visitor authorized to remain until July 25, 1976. On December 16, 1976 an immigration judge found the respondent deportable as an overstay under section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), but granted him the privilege of voluntary departure on or before February 16, 1977. No appeal was taken from that order.

On August 24, 1977, counsel for the respondent filed a motion to reopen the deportation proceedings so that the respondent might file an application for withholding of deportation. The motion states that at the time of the deportation hearing, the respondent had no reason to believe that he might be subject to persecution in Yugoslavia. Since that time, however, the respondent maintains that he has been closely associated with the members of Ravna Gora, an anti-communist organization in Chicago. Through affidavit, the respondent asserts that he became involved with the activities of this group after his marriage to Mira Doychin on January 8, 1977. He further claims that his father-in-law returned to Yugoslavia as a tourist in 1974 and has been imprisoned there since, due to his involvement with Ravna Gora. Although his wife is now deceased, the respondent fears that he will also be imprisoned because of his anti-communist activities in the United States.

The immigration judge denied the motion upon finding that the respondent had failed to establish that there was a clear probability that he would be singled out for persecution. He concluded that the respondent's affidavit contained general, self-serving statements, undocumented by specific evidence.

On appeal, counsel for the respondent argues that the regulations provide that either affidavits or other

evidentiary material be presented in support of a motion to reopen. He submits that at this stage of the proceedings, he should only be required to present the ultimate facts sought to be proven and that the evidence supporting those facts need only be introduced at the reopened hearing.

Motions to reopen in deportation proceedings will not be granted unless it appears that there is new evidence which is material and could not have been discovered and presented at the former hearing. 8 C.F.R. 242.22. A party seeking a reopening must state the new facts which he intends to establish, supported by affidavits or other evidentiary material. 8 C.F.R. 3.8; 8 C.F.R. 103.5.

We recognize counsel's argument that the purpose of a reopened hearing is to enable a movant to develop the new facts and circumstances in his case at the hearing itself. At the same time, however, the immigration judge and the Board are entitled, at a minimum, to factual allegations supported by evidence substantial enough to warrant the delay and time involved in the grant of a reopened hearing. The grant or denial of a motion to reopen is a discretionary determination with the outcome dependent in part upon the likelihood that the applicant will be granted the relief sought if reopening is permitted. *See Matter of Rodriguez*, Interim Decision 2727 (BIA 1979). This is not to say that an applicant must make a full presentation of the evidence with the motion. Rather, what is required are facts and evidence of sufficient force to establish prima facie eligibility for the relief sought. *See Matter of Lam*, 14 I&N Dec. 98 (BIA 1972); *Matter of Sipus*, 14 I&N Dec. 229 (BIA 1972).

A motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that

there is a clear probability of persecution to be directed at the individual respondent. *See Cheng Kai Fu v. INS*, 386 F.2d 750 (2 Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). Although the applicant here claims to be eligible for withholding of deportation which was not available to him at the time of his deportation hearing, he has not presented any evidence which would indicate that he will be singled out for persecution. We note that the respondent's appeal brief makes reference to an oath and declaration taken by the respondent in 1977 when he joined the Ravna Gora and that these documents are not included in the record. We do not feel however, that the inclusion of these documents to the file would alter our conclusion that the respondent here has failed to establish a prima facie case for reopening. Although these documents may demonstrate that the respondent is a member of Ravna Gora, no evidence has been submitted to show that he has participated in the activities of the group or that such participation would subject him to political persecution. The applicant's affidavit, unsupported by objective evidence, does not make out a prima facie case for withholding of deportation. *See, e.g., Matter of Sipus, supra; Kashani v. INS*, 547 F.2d 376 (7 Cir. 1977); *Cheng Kai Fu v. INS, supra*.


We note further that the respondent's appeal brief makes reference to a newspaper article relating to the imprisonment in Yugoslavia of a United States citizen associated with an anti-communist organization. Although this article is absent from the record file, we will not speculate into its contents, as we do not feel that such evidence demonstrates that the respondent himself will be subject to persecution in Yugoslavia. *See generally, Kashani v. INS, supra*. By the

same token, we cannot infer from the imprisonment of the respondent's father-in-law in Yugoslavia that the respondent will be persecuted against based on his own political beliefs.

Based on the foregoing, we conclude that the respondent has failed to establish prima facie eligibility for suspension of deportation. The present motion does not state what evidence the respondent is prepared to present if the proceedings are reopened and does not satisfy us that the additional delay entailed in a reopening would likely be worthwhile. The appeal, accordingly, will be dismissed.

ORDER: The appeal is dismissed.

/s/ David L. Milhollen
Chairman



APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2375 and 82-3195

RAMIN REJAIE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

PETITION FOR REVIEW
IMMIGRATION AND NATURALIZATION SERVICE

Submitted Under Third Circuit Rule 12(6)
October 1, 1982

Before: ALDISERT and HIGGINBOTHAM, *Circuit Judges*,
and SAROKIN, *District Judge*.*

(Filed October 13, 1982)

* Honorable H. Lee Sarokin, of the United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

This petition for review of the Board of Immigration Appeals' denial of motions to reopen deportation proceedings requires us to decide whether the Board imposed an improper burden of proof on the petitioner. The petitioner is an Iranian who came to this country in 1978 to attend school for 10 months—from September 1978 to June 1979—and now does not want to return to his native country. He contends that he will be persecuted if he returns to the Islamic Republic of Iran. In considering petitioner's request for political asylum under § 243(h) of the Immigration and Nationality Act, the Board required him to prove "a clear probability of persecution," a formulation that the Immigration and Naturalization Service equates with "a well-founded fear of persecution."

We find no error and deny the petition for review at No. 81-3195.¹

I.

Ramin Rejaie, a native and citizen of Iran, was admitted to the United States as a nonimmigrant student on September 9, 1978. He was authorized to attend Oakwood School in Poughkeepsie, New York, and to remain in the United States until June 30, 1979. According to Immigration and Naturalization Service allegations, however, he never attended Oakwood School but, without obtaining permission from the INS as required by 8 C.F.R. § 214.2(f)(4), enrolled instead at the Valley Forge Military Academy in Wayne, Pennsylvania. Moreover, he failed to depart the United States on June 30, 1979, or to obtain INS permission to stay beyond that date.

At a deportation hearing held January 8, 1980, Rejaie admitted the allegations. The immigration

¹ We have before us two petitions for review; however, petitioner agrees that under our decision in *Dastmalchi v. INS*, 660 F.2d 880 (3d Cir. 1981), this court is without jurisdiction to review the contention raised at No. 81-2375 that the Immigration and Naturalization Service abused its discretion when, subsequent to petitioner's deportation hearing, it denied his requests for school transfer and for extension of stay. In *Dastmalchi* we held that

courts of appeals have initial jurisdiction under section 106(a) only in cases seeking judicial review of: (1) a final order of deportation entered pursuant to section 242(b) deportation proceedings; (2) an order made during a section 242(b) deportation proceeding and reviewable by the Board of Immigration Appeals . . . ; or (3) a motion to reopen deportation proceedings previously conducted under section 242(b) or to reconsider a final order of deportation

660 F.2d at 885-86. Therefore, we dismiss the petition for review at No. 81-2375.

judge found him deportable, but granted his request for voluntary departure until February 8, 1980. Rejaie appealed to the Board of Immigration Appeals, but on June 18, 1981, the Board upheld the finding of deportability.

Although ordered to report for deportation on August 27, 1981, on that date he filed a petition for review in this court, No. 81-2375, which entitled him to an automatic stay under 8 U.S.C. § 1105a(3). Also on that date, he filed with the INS a Request for Asylum in the United States, contending that he feared political persecution if he were forced to return to Iran, thereby moving to reopen his case.² On

² The relevant INS regulation states: "The applicant for asylum has the burden of satisfying the immigration judge that he would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion as claimed." 8 C.F.R. § 108.3(a) (1981). Moreover, the INS regulation provides:

A request for asylum introduced by an alien or his representative following completion of a deportation hearing shall be considered as a motion to reopen the hearing for the purpose of submitting a request for withholding of deportation under section 243(h) of the Act Notwithstanding the provisions of §§ 103.5 and 242.22 of this chapter, a request for asylum may be considered as a motion to reopen under this paragraph and accepted for filing provided it reasonably explains the failure to assert the asylum claim prior to completion of the deportation hearing. If the motion does not reasonably explain such failure the claim for asylum will be considered spurious and dilatory, absent evidence to the contrary.

8 C.F.R. 108.3(b) (1981).

The burden of proof relevant to requests for political asylum is set forth in 8 C.F.R. § 208.5 (1981):

The burden is on the asylum applicant to establish that he/she is unable or unwilling to return to, and is unable

October 16, 1981, the Board denied his motion to reopen, "on the ground that the respondent has failed to reasonably explain why he did not assert his asylum claim prior to completion of the deportation hearing." Record at 112. On December 10, 1981, he filed a second motion to reopen and reconsider, this time explaining that he had been unaware of certain political developments in Iran at the time of his deportation proceedings. Noting that Rejaie had failed to substantiate the claims made in his motions to reopen, the Board denied the second motion.³ Rejaie filed a

or unwilling to avail himself or herself of the protection of the country of such person's nationality . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

³ The Board explained:

The facts in this case have been fully set forth in our earlier decisions. Over 26 months have now passed since the respondent was granted the privilege of voluntary departure. A warrant for his deportation was issued by the District Director on August 26, 1981. Seven days later, on the very date that the respondent had been ordered to report "completely ready for deportation", he filed a petition for review. Not only does the long history of this case clearly demonstrate a series of dilatory tactics by and on behalf of the respondent, but there has been absolutely no substantiation of what counsel described as the respondent's "well-rounded [sic] fear of persecution, which has grown and developed since the completion of the deportation hearing", or of the alleged prospect of his induction into the military if deported to Iran.

In a memorandum in opposition to this motion to reopen, the Service emphasized that the "respondent has submitted no substantial evidence which would justify reopening." The Service concluded that "The motion to reopen is an obvious attempt to delay the deportation of

second petition for review, No. 82-3195, which we consolidated with No. 81-2375.

II.

Rejaie contends that the Board applied an incorrect burden of proof in considering his fear of persecution in Iran. Before we reach that issue, however, we note a significant omission in Rejaie's argument. Petitioner's brief fails to respond to one of the Board's stated reasons for denying relief: his failure to submit substantial evidence to justify reopening his claim. Under 8 C.F.R. § 208.11 (1981)

[a]n alien may request that . . . [a] deportation proceeding be reopened pursuant to . . . 8 C.F.R. § 242.22 . . . on the basis of a request for asylum. Such request must reasonably explain the failure to request asylum prior to the completion of the . . . deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary.

Moreover, under § 3.8(a), "[m]otions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material." The Supreme Court has observed that motions under § 3.8 "will not be granted 'when

the respondent, which should not be permitted To again reopen at this time would be frivolous and would serve no useful purpose." We agree. As this Board has long since held, "There must be some finality to litigation." See *Matter of Campos*, 13 I&N Dec. 148 (BIA 1969). Accordingly, the motion to reopen will be denied.

Record at 85.

a *prima facie* case of eligibility for the relief sought has not been established.'” *INS v. Jong Ha Wang*, 450 U.S. 139, 141 (1981) (per curiam) ((quoting *In re Lam*, 14 I. & N. Dec. 98 (BIA 1972))).

Petitioner does not now argue that he made a sufficient showing of “new facts” supported by affidavits or other evidence. Rather, in his brief he simply summarizes the factual content of his motion without explaining which, if any, of the narrated events, substantiated or otherwise, occurred after the deportation hearing and thus qualify as “new facts.” His argument to the Board in his second motion to reopen is clearer, however, and indicates that petitioner’s “new facts” related to the war between Iran and Iraq, and his unwillingness to serve in the Iranian military. Assuming that the motion before the Board constitutes the basis of petitioner’s argument on appeal, we will consider the burden of proof issue.⁴

III.

Until the passage of [the] Refugee Act of 1980, it was generally accepted that under § 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h), the INS could withhold political asylum absent a “clear probability” that an alien would suffer persecution if deported. *See, e.g., Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536, 538

⁴ Although the Board in its several opinions did not expressly label the applicable burden of proof, we will assume that it agreed with the government’s Memorandum in Opposition to Motion to Reopen, in which the legal standard was identified as “clear probability,” Record at 91-92, inasmuch as that standard had been approved in a long line of cases, *see discussion, infra*.

(7th Cir. 1967). In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6257, 606 U.N.T.S. 268, which essentially adopted the definition of "refugee" used in the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150. Under Article 1 of the Protocol, a "refugee" is a person who, "owing to *a well-founded fear of being persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality" (emphasis added). Under Article 33, no party to the Protocol may "return . . . a refugee . . . to . . . territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion" Whether accession to the Protocol affected burden of proof of persecution was addressed in *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977), in which the court determined that there was no substantial difference between "clear probability" and "a well-founded fear":

While the Protocol, unlike section 243(h) of the Immigration and Nationality Act, does not specifically grant discretion to the Government in determining whether deportation must be withheld, it only requires withholding when an alien has a "well founded fear of being persecuted." This language surely refers to more than the alien's subjective state of mind. We hold that an alien claiming a "well founded fear of persecution" must either demonstrate that he actually has been a victim of persecution or that his fear is more than a matter of his own conjecture. Our interpretation of "well founded" conforms with the understanding of the committee that drafted the

definition of a refugee. See United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39 (February 17, 1950) (E/1618; E/AC 32/5).

This requirement can only be satisfied by objective evidence that the alien's assertions are correct. Thus, the "well founded fear" standard contained in the Protocol and the "clear probability" standard which this court has engrafted onto section 243(h) will in practice converge.

547 F.2d at 379.

This formulation is congruent with the Board's seminal decision in *In re Dunar*, 14 I. & N. Dec. 310 (BIA 1973), in which the Board considered whether the Senate's accession to the Protocol changed an alien's burden under § 243(h) from that of showing a "clear probability of persecution" to that of showing "a well-founded fear of being persecuted." Like the court in *Kashani*, the Board concluded that notwithstanding the difference in the terminology, the showings required by the Protocol and by § 243(h) were essentially the same. The Board characterized the showing of "well-founded fear" as demanding not merely evidence of a subjective or conjectural fear of persecution, but objective evidence establishing a realistic likelihood of persecution. 14 I. & N. Dec. at 319.

The Board's conclusion in *Dunar* is based on the history of the Senate's accession to the Protocol. The Senate clearly acceded to the Protocol with the understanding that the substance and procedures of our immigration law would remain unchanged.⁵ More-

⁵ In *Dunar* the Board observed:

In his statement to the Senate Committee on Foreign Relations, the State Department's representative, Laur-

over, as noted in *Dunar*, a United Nations committee had explained "well-founded fear" as follows: "The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either

ence A. Dawson [Acting Deputy Director of the Office of Refugee and Migration Affairs] asserted:

. . . [W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a contracting state to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act.

14 I. & N. Dec. at 317 (quoting Protocol Relating to Refugees, Exec. Rep. No. 14, 90th Cong., 2d Sess. app. at 8 (1968) [hereinafter cited as Report]).

The following colloquy between Senator Sparkman, Chairman of the Committee, and Mr. Dawson is also helpful:

SENATOR SPARKMAN. I want to make certain of this: Is it absolutely clear that nothing in this protocol, first, requires the United States to admit new categories or numbers of aliens?

MR. DAWSON. That is absolutely clear.

Report at 19.

Senator Mansfield, at the time of the Protocol's submission to the Senate stated: "It is understood that the Protocol would not impinge adversely upon the Federal and State laws of this country." 114 Cong. Rec. 12,021 (daily ed. Oct. 3, 1968).

been actually a victim of persecution or can show good reason why he fears persecution." United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 39 (1950). In the years following the decision in *Dunar*, the expressions "clear probability" and "well-founded fear" were regarded as meaning the same thing: an alien who requested political asylum in America had to present some objective evidence establishing a realistic likelihood that he would be persecuted in his native land. See, e.g., *Fleurinor v. INS*, 585 F.2d 129, 132, 134 (5th Cir. 1978); *Martineau v. INS*, 556 F.2d 306 (7th Cir. 1977) (per curiam); *Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977); *Zamora v. INS*, 534 F.2d 1055, 1058, 1063 (2d Cir. 1976). Nevertheless, relying on *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), petitioner contends that this consensus was upset by the passage of the Refugee Act of 1980. We now examine that legislation to determine whether it produced a significant change.

IV.

The Refugee Act adds to the Immigration Act a new definition of "refugee" as, *inter alia*, any person who has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). The legislative history shows that the House and Senate added that definition to conform the language of the Immigration and Nationality Act to the language of the Protocol.

The Committee Amendment provides a new definition of the term "refugee" which will be added to the Immigration and Nationality Act. The first part of the definition essentially conforms to that

used under the United Nations Convention and Protocol Relating to the Status of Refugees.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

The bill provides a new statutory definition of a refugee which will be added to the Immigration and Nationality Act. . . . [T]he new definition will bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees

S. Rep. No. 256, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News 141, 144.

The Refugee Act also modifies § 243(h) so that an alien is eligible for withholding of deportation if he can show that his "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h) (1) (Supp. IV 1980).⁸

⁸ The prior version of § 243(h) provided:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1976) (amended 1980). ⁹

As amended by the Refugee Act of 1980, the section states in relevant part:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h) (1) Supp. IV (1980).

Like the adoption of the new definition of "refugee," the modification of § 243(h) was effected solely for the sake of clarity so that its language would conform more closely with the language of the Protocol. In modifying § 243(h), the House clearly understood that the standards under § 243(h) and under the Protocol were the same.

Related to Article 33 [the portion of the Protocol that prohibits the expulsion of a "refugee"] is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention. This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979) (emphasis added).

The government on this appeal advises us that the Board, in determining eligibility for withholding of deportation, has continued to use the same analysis that it used prior to the passage of the Refugee Act,

and that the Board continues to view as interchangeable the terms "clear probability" and "well-founded fear" to describe that analysis. See *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA 1981); *In re Lam*, Interim Dec. No. 2857 (BIA 1981). Under this analysis the Board takes into consideration an alien's apprehensions of persecution, but also requires him to produce objective evidence which demonstrates the realistic likelihood that he, or a class to which he belongs, will be persecuted. Generalized, undocumented fears of persecution or political upheaval which affect a country's general populace are insufficient bases for withholding deportation under § 243 (h). *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA 1981).

Notwithstanding the foregoing, the Second Circuit in *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), concluded that the Refugee Act has in fact produced a change in the burden of proof. Because petitioner's argument depends on that case, we now turn to analysis of the Second Circuit's reasoning.

V.

Acknowledging that "the matter is hardly free from doubt," *id.* at 404, the *Stevic* court charted the evolution of the phrases in issue. It noted that prior to the 1968 accession to the United Nations Protocol, the INS had employed the "clear probability" standard in regard to deportable aliens under § 243(h), but, under § 203(a) (7) (repealed 1980), had applied a less stringent standard, "good reason to fear," when considering admission of aliens not already in this country. *In re Tan*, 12 I. & N. Dec. 564 (BIA 1967). The Protocol's definition of "refugee"—a person having a "well-founded fear of being persecuted"—was,

in the *Stevic* court's view, "considerably more generous than the 'clear probability' test," 678 F.2d at 405, and more closely resembled the standard used under § 203(a)(7). Turning its attention to developments between 1968 to 1980, the court focused on "suggestions" that modification of practice under § 243(h) might be required by the Protocol: a statement in *Dunar* that procedures would be "substantially" unaffected and that minor changes could be handled administratively; and the statement of the Secretary of State that Article 33 was "comparable" to § 243(h). The court in *Stevic* faulted the Board's *Dunar* opinion:

Ignoring that its own case law had consistently differentiated between Section 203(a)(7)'s "good reason" test and Section 243(h)'s "clear probability" requirement, the BIA leapt illogically from the proposition that "good reason" includes objective factors as well as an applicant's subjective beliefs to the conclusion that it was the same test as "clear probability."

678 F.2d at 407. Acknowledging that *Kashani* had equated the two tests, the *Stevic* court noted that the Fifth Circuit in *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977), had stated that the Protocol, while not profoundly altering the law, "'reflects or even augments the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law.'" 678 F.2d at 407 (quoting 559 F.2d at 997).

Finally, the court gauged the effect of the Refugee Act of 1980. It observed that the addition of the definition of "refugee," the modification of § 243(h), and other changes tending to eliminate disparity in procedures were effected at a time when Congress was acutely aware of the plight of "boat people." The

court concluded that the adoption of the Protocol's definition of "refugee" eliminated the distinction between the standards that had been applied in §§ 243 (h) and 203(a)(7), and that if only one standard could be used, Congress would seek to employ the more humanitarian standard.

Upon examining the opinion in *Stevic*, we conclude that the court erred. First, it attributed a stringency to the phrase "clear probability" that was not consistent with its own observation in *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), that, under the "clear probability" standard, "[i]n order to forestall deportation the aliens must show some evidence indicating they would be subject to persecution," a formulation that closely approximates the *Dunar* definition of "well founded fear" as "realistic likelihood of persecution." 14 I. & N. Dec. at 319. Second, the court failed to appreciate the caselaw consensus, discussed *supra*, that the two standards were equivalent. Third, the court apparently misapprehended the legislative history of the 1968 accession to the Protocol and of the Refugee Act. As we have noted above and as the *Stevic* court itself acknowledged, Congress was repeatedly assured that accession to the Protocol would not enlarge or alter the effect of existing immigration laws. The Refugee Act's adoption of the Protocol's definition of "refugee" and the modification of § 243(h), as we have seen, were made solely for the sake of clarity. Conceding that the Senate report stated that the amendment to § 243(h) worked "no major change," the *Stevic* court described the House report as "ambiguous." We perceive no ambiguity in the House Committee's statement:

Although [Section 243(h)] has been held by court and administrative decisions to accord to

aliens the protection required under Article 33 [of the Protocol], the Committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979). The legislative history points in one direction only: the modification of § 243(h) was effected merely to conform the language to that of the Convention and Protocol. This was merely cosmetic surgery, for in operation INS procedures under the old § 243(h) had been held to conform.

In our view, the *Kashani* conclusion that there is no difference in the Board's burden of proof formulation whether labeled "clear probability" or "well-founded fear" of persecution survives the Refugee Act of 1980. We reject a view that would "make a fortress out of a dictionary," *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945). A word or a phrase "is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.). We read "well-founded fear" within the circumstances of its use and hold that it equates with "clear probability."

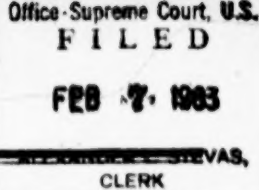
VI.

Applying these legal precepts to the facts brought before us by this petition for review, we hold that the Board did not err in denying the motions to reopen. Petitioner presented to the Board only his conjecture that he would be faced with induction into the military if he was returned to Iran, and that, because war was repugnant to his personal beliefs, he

would refuse induction and therefore suffer persecution. None of these allegations was supported by affidavit or any other form of proof. Therefore, we must conclude that petitioner did not demonstrate by objective evidence a realistic likelihood that he would be persecuted in his native land. The "probability of persecution" is not "clear"; the "fear of persecution" is not "well-founded."

VII.

The petition for review at 81-2375 will be dismissed for lack of jurisdiction. The petition for review at 82-3195 will be denied.



No. 82-973

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PREDRAG STEVIC

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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(i)

QUESTION PRESENTED

Whether the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 et seq., changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation.

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(1)

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

No. 82-973

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

PREDRAG STEVIC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals
(Petitioner's App.B, 4a-25a) is reported
at 678 F.2d 401. The order of the court
of appeals denying rehearing (Petitioner's

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App. A, 1a-3a) is not reported. The decisions of the Board of Immigration Appeals (Petitioner's App. D, 27a-31a; Petitioner's App. E, 32a-36a) are not reported.

JURISDICTION

The judgment of the court of appeals (Petitioner's App. C, 26a) was entered on May 5, 1982, and a petition for rehearing was denied on July 29, 1982 (Petitioner's App. A, 1a-3a). On October 22, 1982, Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including December 10, 1982. The jurisdiction of this Court was invoked by petitioner under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. (Supp.V) 1253(h) (1) provides:

The Attorney General shall not deport or return any alien *** to a country if the Attorney General

(3)

determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

Predrag Stevic was born on June 11, 1950 in Gnjilane, Kosovo, Yugoslavia, a section of Yugoslavia that is 92% occupied by Albanians, who are trying to have this part of Yugoslavia secede from Yugoslavia and become part of Albania.

Mr. Stevic came to the United States on June 8, 1976, to visit his sister, Vidosava Stevic Lazarevic, who is now a United States citizen.

After Mr. Stevic arrived, he was introduced to a young lady, Mirjana Doichin, a United States citizen. Mirjana was born in Belgium, but her parents had been refugees from Yugoslavia and had been in Yugoslavian concentration camps. In

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1976-1977, Mirjana's father, Vladimir Doichin, a United States citizen, was in prison in Yugoslavia as an anti-Communist. Believing that his United States citizenship would protect him, he had gone back to Yugoslavia to visit, and had been imprisoned.

Because his permission to stay in the United States had expired and he wished to remain and to marry Mirjana, Mr. Stevic, with his sister Vidosava, went to the Immigration and Naturalization Service (hereinafter "INS") in Chicago to ask for an extension of time to stay. Upon his applying for an extension, he was instead served with an Order to Show Cause.

Mr. Stevic appeared at a deportation hearing at the INS offices in Chicago on December 16, 1976, with an attorney. Upon the advice of his attorney, he did

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not contest his deportability or ask for political asylum, but instead agreed to two months "voluntary departure". He was advised properly by his attorney that the proceedings would automatically be re-opened were he to marry Mirjana, a United States citizen, and she were to file an immediate relative petition for him.

On January 16, 1977, Mr. Stevic married Mirjana, who filed an immediate relative petition with the INS so that he would be eligible for adjustment of status to lawful permanent residence.

On April 5, 1977, the immediate relative petition was approved by INS.

On April 10, 1977, Mrs. Stevic was killed in an automobile accident.

The immediate relative petition was revoked by INS on June 13, 1977.

Mr. Stevic's attorney in Chicago requested that the petition be reinstated

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for humanitarian reasons under newly enacted 8 C.F.R. Section 205.1(a)(3). The District Director in Chicago denied the request, although this law had been passed to cover just these circumstances.

On August 24, 1977, Mr. Stevic's attorney made a motion to INS in Chicago to reopen deportation proceedings so that Mr. Stevic could apply for political asylum in the United States. He had become quite active as a member of several prominent anti-Communist organizations in Chicago.

The motion was denied because it did not demonstrate a "clear probability of persecution", the prior-1980 standard for political asylum.

His attorney appealed this decision to the Board of Immigration Appeals. The appeal was dismissed in January, 1980, because of failure to establish a prima

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facie case and sufficient evidence to indicate he would be "singled out for persecution". This decision was not appealed by Mr. Stevic's attorneys in Chicago to the Court of Appeals.

On July 17, 1981, Mr. Stevic was arrested in Chicago for deportation. While changing planes in New York City, he engaged in an altercation with his guards, and was placed in a detention center in New York City.

A Writ of Habeas Corpus was brought before the United States District Court, Southern District of New York, which addressed itself only to the abuse of discretion by INS in the denial of humanitarian relief under 8 C.F.R. Section 205.1(a)(3).

Simultaneously, a motion was made to the Board of Immigration Appeals to reopen and reconsider deportation under Section

243(h) of the Immigration and Nationality Act, submitting to the Board voluminous evidentiary material not available at Mr. Stevic's 1976 deportation hearing, to establish prima facie eligibility for political asylum. This motion was denied on September 3, 1981. The denial, in summary, held that Mr. Stevic had failed to prove a "clear probability of persecution" that will be directed at him (the standards of 243(h) prior to the Refugee Act of 1980) were he to be returned to Yugoslavia. (App. B, infra, 6a-7a).

Although Mr. Stevic had submitted affidavits from prominent members of the anti-Communist Yugoslavian community expressing the opinion that he would be imprisoned if he returned to Yugoslavia because of Yugoslavia's "hostile propaganda" laws, proof of his membership in the leading anti-Communist Yugoslavian

organizations in Chicago, reports from Amnesty International regarding Yugoslavia's "hostile propaganda" laws, and newspapers and magazine articles concerning the Albanian terroristic activities in Kosovo, which the Yugoslavian government is unable to control, the Board of Immigration Appeals felt that he had provided no "direct evidence" to link his activities in this country to the probability of his persecution in Yugoslavia. Under Yugoslavia's "hostile propaganda" laws, however, a person may be imprisoned for promulgating anti-Communist propaganda outside of Yugoslavia. Mr. Stević's father-in-law, a United States citizen, had been imprisoned under this law.

Mr. Stevic's Petition for Habeas Corpus was denied and in a consolidated proceeding, the District Court's denial was appealed and review was sought for

the Board of Immigration Appeals' denial of his motion to reopen deportation proceedings to give him an opportunity to apply for political asylum under Section 243(h) of the Immigration and Nationality Act.

Although the Court of Appeals upheld the District Court's denial of the Petition for Habeas Corpus, it reversed the Board of Immigration Appeals denial of Mr. Stevic's motion to reopen, holding that the enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 et. seq., had changed the standards to be used by the INS in adjudicating requests for withholding of deportation under Section 243 (h) of the Immigration and Nationality Act.

The court held that under Section 243(h), the non-discretionary standard was now a "well-founded fear of persecu-

tion", the language contained not only in Section 243(h), but also in the UN Protocol Relating to the Status of Refugees, to which the United States had adhered. The court found that the standard of a "well-founded fear of persecution" differed from the "clear probability" concept that an individual would be singled out for persecution, and that while the Board of Immigration Appeals' administrative practice had, prior to the passage of the Refugee Act of 1980, been to apply the "clear probability" test, the UN Convention and Protocol Relating to the Status of Refugees imposed an absolute obligation upon the United States to determine refugee status according to the "well-founded fear of persecution" standard.

A new hearing under the legal standard established by the UN Protocol was ordered.

REASONS FOR DENYING THE PETITION

The basic theme of the government's position is that to properly adjudicate refugee and asylum cases, using the standards adopted by the U.S. government in adhering to the UN Convention and Protocol Relating to the Status of Refugees and in revising Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), would impose too great an administrative burden.

The government does not contend that under the proper standard for adjudicating refugee and asylum cases, our shores would be flooded; the contention is wrongly that all 9,000 of the applications for asylum or withholding of deportation since the passage of the Refugee Act of 1980 could hinge upon whether the standard test applied is the "clear probability of persecution" or a "well-founded fear of

persecution".

In fact, most applications for asylum do not meet either test. For instance in Rejaie v. INS, 691 F.2d 139 (1982) (Petitioner's App. F, 37a-54a), Mr. Rejaie was an Iranian student who did not want to return to Iran to fight in a war against Iraq. Being required to join your country's armed forces does not meet the test of either a "clear probability of persecution" or a "well-founded fear of persecution". Mr. Rejaie submitted no affidavits or any other form of proof that he would be persecuted were he to be returned to Iran. Clearly he was not a pacifist, as his status in the United States came to the attention of the INS when he enrolled without INS authorization in the Valley Forge Military Academy. The conclusion of the 3rd Circuit Court of Appeals was that in his case, "the

'probability of persecution' is not 'clear'; the 'fear of persecution' is not 'well-founded'."

The 3rd Circuit Court of Appeals criticized the Stevic decision, stating that it had been advised by the government that the Board of Immigration Appeals viewed as interchangeable the terms "clear probability" and "well-founded fear" of persecution. It held that the change in the language of Section 243(h) was merely cosmetic surgery and that based upon the government's opinion, it found that there was no difference in the Board of Immigration Appeals' burden of proof formulation, whether labelled "clear probability" or "well-founded fear" of persecution.

In the case of Rejaie, both standards appear to have been lacking.

Mr. Stevic, in contrast, had a well-

founded fear of persecution based upon Yugoslavia's "hostile propaganda" laws and his proven anti-Communist activities, and the fact that a family member, also an anti-Communist active in the same organizations in the United States to which Mr. Stevic belonged, had been imprisoned in Yugoslavia. If this documented evidence is not enough to establish a prima facie case for a "clear probability" of persecution, then clearly there is a difference between the two standards, and this difference must be administratively recognized, as the "well-founded fear of persecution" happens to be the law.

It cannot be denied that there is a conflict in circuits. The 6th Circuit Court of Appeals in Reyes v. INS, 693 F.2d 597 (1982), (App. A, infra, 1a - 5a), siding with the 2nd Circuit Court of Ap-

peals Stevic decision, held that the "clear probability" test that an alien would specifically be subject to persecution for her political beliefs if she were to return to her own country was too stringent a standard to be applied to an alien seeking political asylum or withholding of deportation, and that since the alien had presented evidence and documented her claim for a "well-founded fear of persecution" under Section 243(h) of the Immigration and Nationality Act, her claim must be favorably considered.

Moreover, Mr. Stevic has now returned to Chicago, having been released from an Immigration jail in the 2nd Circuit, and is now residing in the 5th Circuit, which has rendered no decisions on the subject.

On the other hand, is this an issue that the Supreme Court should consider at this time? Guidelines for adjudicating

asylum claims under the UN Protocol are available. With judicial capacity in the adjudicating officers of the INS, proper interpretation of the guidelines under the "well-founded fear of persecution" standard of Section 243(h) should not be difficult.

Moreover, the 6th Circuit decision in Rejaie v. INS, 691 F.2d 139 (1982) (Petitioner's App. f, 37a-54a), demonstrates not that there is no difference between "clear probability of persecution" and "well-founded fear of persecution", but rather that in many cases, neither standard can be met with even the most liberal interpretation. How then would there be any tremendous administrative burden on the INS were the proper standard to be followed? In fact, the Board of Immigration Appeals will be aided by being able to finally have a

(18)

clear standard by which to judge 243(h)
cases which is in accordance with federal
and international laws.

CONCLUSION

The petition for a writ of certiorari
should be denied.

Respectfully submitted.

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February 1983

(1a)

No. 81-3157

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIANE ROWENA ESTRELLA REYES,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

ON APPEAL from the
Immigration and Na-
turalization Service.

Decided and Filed November 18, 1982

Before: KEITH and JONES, Circuit Judges, and WEICK,
Senior Circuit Judge.

PER CURIAM. This is an appeal by petitioner, 22-year-old Liane Reyes, of a denial of her petition for asylum or the withholding of deportation under § 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1235(h). Reyes is a native and citizen of the Philippines. The Immigration Appeals Board affirmed the decision of the Immigration Judge, dismissed the appeal, and ordered the petitioner to depart the United States within thirty days of its decision. This appeal followed. We reverse.

Petitioner entered the United States on August 15, 1975 as a nonimmigrant exchange visitor under the Youth for Understanding exchange student program and pursuant to 8 U.S.C. § 1101(a)(15)(J). She was authorized, by a "J" visa, to remain in the United States until September 1, 1973, but remained here well beyond that date.

On November 14, 1979, the INS issued an Order to Show Cause and Notice of Hearing in which it was charged that Reyes was subject to deportation under § 241(a)(2) of the Immigration Act, 8 U.S.C. § 1251(a)(2). The hearing began on February 26, 1980, and was completed on April 22, 1980. While petitioner admitted that she was deportable, she asked for political asylum and withholding of deportation. She claimed that if she returned to the Philippines she would be persecuted for her political beliefs.

The petitioner testified at the hearing, and submitted documents relating to the request for asylum. Before the close of the hearing, the Immigration Judge granted Reyes fifteen days to submit any additional documents. On July 29, 1980, the Immigration Judge, in a written opinion, denied the application for asylum, and ordered that the petitioner be granted voluntary departure, in lieu of deportation, without expense to the government. That departure was to take place before August 29, 1980.

In support of her application for political asylum, Reyes testified that, when 13 or 14 years old, she participated in anti-Marcos¹ activities and that, in 1974 or 1975, she was taken from school, detained and questioned for two or three days. She further testified that the school officials wanted her to stop speaking out against the government, and that after she received that warning, her grades went down. She stated that she had been expelled from two schools, but gave no reason for the expulsions.

In addition, she admitted that she had been disciplined several times in school for disrupting classes and that her speeches were sometimes uninvited and in disruption of the class. Furthermore, she stated that she has family in the Philippines, none of whom have been persecuted. She also stated that the program upon which she came to the U.S. was, in part,

¹ President Ferdinand E. Marcos is the leader of the present martial law government in the Philippines.

probably funded by the government and that she was not persecuted, nor would she be, for her religion alone.

In addition to this testimony at trial, Reyes introduced a series of documents. First, she offered a series of articles from newspapers and magazines describing that the Philippines was lacking in human and civil rights. In addition, there were affidavits concerning trips of two persons to the Philippines and the general tenor of Philippine society. The only documents that dealt directly with Reyes were a letter by James Reuter, Director of Mass Media for the Catholic Church in the Philippines and statements by Robert Baylor. Reuter's letter described particular incidents of persecution and violence against others, and advised she should not return to the Philippines. Baylor's letter was also quite descriptive.

The Immigration Judge denied the petitioner's request for asylum, stating that though the evidence introduced in the record and at the hearing shows that "the present Philippine government fails to provide the freedoms and other constitutional guarantees to be found in the United States," the true test in asylum cases is whether the petitioner can "establish that she will be singled out for persecution on the basis of her race, religion, political opinion, nationality (ethnicity) or membership in social organizations."

On review we must determine whether the Board applied the correct legal standard below and whether the Board's decision is supported by substantial evidence in the record as a whole.

We hold the Board correctly stated that the burden on the person seeking asylum under § 243(h) is to show that, if deported, he or she would be singled out for persecution based on his race, religion, nationality, membership in a particular social group, or political opinions. *McMullen v. Immigration and Naturalization Service*, 658 F.2d 1312 (9th Cir. 1981). Yet, it also stated that to meet that burden, "the alien

must demonstrate a clear probability that he will be persecuted if returned to his country. *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968)."

It is important to note that there were substantial changes in the Immigration Act since *Cheng Kai* had been decided. In fact, the Second Circuit has suggested that the "clear probability" test is inconsistent with the tenor and spirit, if not the language, of the new provisions. In *Stevic v. INS*, 678 F.2d 401 (2d Cir. 1982), the Second Circuit wrote:

Both the text and history of that document [the new Act] strongly suggest that asylum may be granted, and under Section 243(h), deportation must be withheld, upon a showing *far short of a "clear probability"* that the individual will be singled out for persecution. *Id.* at 409 (emphasis added).

Since the Board applied the more stringent clear-probability test, the holding cannot stand. It is admitted that there is some evidence that Reyes may be subject to persecution. All the Board held was that she had not shown, by a clear probability, that she would specifically be subject to it. Since something less than that showing is now required, we find that the Board erred.

In considering the petitioner's evidence for sufficiency, we must analyze the two sub-issues involved. They are, first, the kind of evidence needed, and second, whether it was sufficient to support the petitioner's claim.

The INS cites two Ninth Circuit cases for the proposition that some objective evidence concerning the likelihood of persecution is needed. *Moghanian v. Department of Justice*, 577 F.2d 141 (9th Cir. 1978) and *Pereira v. INS*, 551 F.2d 1149 (9th Cir. 1977). These cases do support the view that one must have more than one's own testimony to support a claim under § 243(h). Yet, it is not clear what kind of objective evidence is needed. Obviously, we do not wish to force the INS to accept potentially self-serving statements

as true in granting asylum under § 243(h). On the other hand, it is difficult to see what more than what was offered here we would require, short of proof of actual persecution after the fact. Here, Reyes offered affidavits from relatives, general newspaper and documentary reports concerning the general conditions in the Philippines and a letter from the Director of Mass Media of the Philippine Catholic Church. Finally, there is her own testimony.

We hold that under the circumstances here, the testimony of the individual *and* documents offered indicating a repressive environment and suggesting that petitioner *not* return to the Philippines is sufficient to bring her risk within the tenor and spirit of the new provisions of the Act. *Stevic v. INS.*, *supra*; *McMullen*, *supra*.

We find no evidence in the record which detracts from the force of the evidence offered by and on petitioner's behalf. Thus, in considering the record as a whole, we not only find that there is not substantial support in the record for the conclusions of the Board, but that overwhelming evidence supports petitioner's claim.

Accordingly, the order of the Board is REVERSED and the case REMANDED to the Board with directions to grant the petition.

Public Law 96-212
96th Congress

An Act

Mar. 17, 1980

[S. 643]

To amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes.

Refugee Act of
1980.

8 USC 1101 note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Refugee Act of 1980".

TITLE I—PURPOSE

8 USC 1521 note.

SEC. 101. (a) The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States. The Congress further declares that it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.

(b) The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.

TITLE II—ADMISSION OF REFUGEES

SEC. 201. (a) Section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)) is amended by adding after paragraph (41) the following new paragraph:

"Refugee."

"(42) The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, (or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on

Post, p. 103.

account of race, religion, nationality, membership in a particular social group, or political opinion.”

(b) Chapter 1 of title II of such Act is amended by adding after section 206 (8 U.S.C. 1156) the following new sections:

**“ANNUAL ADMISSION OF REFUGEES AND ADMISSION OF EMERGENCY
SITUATION REFUGEES**

“SEC. 207. (a)(1) Except as provided in subsection (b), the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e)), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

Entry,
numerical
limitations.
8 USC 1157.

“(2) Except as provided in subsection (b), the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

“(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

“(b) If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

Emergency
conditions.

“(c)(1) Subject to the numerical limitations established pursuant to subsections (a) and (b), the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act.

Attorney
General's
authority.

“(2) A spouse or child (as defined in section 101(b)(1) (A), (B), (C), (D), or (E)) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 101(a)(42), be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this Act. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

Spouse or child,
admission
status.
8 USC 1101.
Ante. p. 102.

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No. 82-973

Office: Supreme Court, U.S.

FILED

FEB 18 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONER

REX E. LEE

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In the Supreme Court of the United States

OCTOBER TERM, 1982

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IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

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PREDRAG STEVIC

*ON PETITION FOR A WRIT OF CERTIORARI TO
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REPLY MEMORANDUM FOR THE PETITIONER

Respondent concedes (Br. in Opp. 15-16) the existence of a conflict between, on the one hand, the decision below and *Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982), and, on the other hand, the Third Circuit's decision in *Rejaie v. INS*, 691 F.2d 139 (1982), concerning the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation. Amicus curiae Lawyers Committee for International Human Rights contends (Am. Br. 1, 8), nevertheless, that our request for resolution of that conflict is premature because the Third Circuit, on further reflection, might see the error of its ways, overrule its decision in *Rejaie* and embrace the reasoning of the Second Circuit, and because other courts of appeals "are likely to follow the decision below."

Notwithstanding amicus' predictions, however, the Third Circuit already has reaffirmed its decision in *Rejaie v. INS*, *supra*, in *Marroquin-Manriquez v. INS*, No. 82-3163 (Jan. 27, 1983), slip op. 7-8.¹ And the Ninth Circuit has recently recognized that "probable political persecution" is the standard for asylum relief "under the heretofore decided cases." *Raass v. INS*, 692 F.2d 596 (1982). Accordingly, there is no basis for believing that the conflict among the circuits will disappear.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

FEBRUARY 1983

¹We are serving copies of the opinion in *Marroquin-Manriquez* on respondent and amicus and are lodging 10 copies with the Clerk of the Court.

No. 82 973

Office - Supreme Court, U.S.
FILED

FEB 9 1983

IN THE

~~STEFAN E. STEVAS,~~
CLERK

Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

-against-

PREDRAG STEVIC

**BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Lawyers Committee for
International Human Rights
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No. 82 973

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

- against -

PREDRAG STEVIC

PRELIMINARY STATEMENT

This brief is offered by the
Lawyers Committee for International Human
Rights as an amicus curiae in this
matter. Since 1978, the Committee has
assisted in providing legal representa-
tion for numerous applicants for
political asylum in the United States

United States from countries all over the world. The parties have consented in writing to the submission of this brief.

REASONS WHY THE PETITION FOR
CERTIORARI SHOULD NOT BE GRANTED

1. Petitioner's assertion that the decision below "squarely conflicts" with the decision of the Third Circuit in Rejaie v. INS, 691 F. 2d 139 (3d Cir. 1982), is premature. In view of the relief accorded below, review by the Court is not now necessary. Furthermore, the decision below is correct, as the Sixth Circuit has recognized, and other circuits, including the Third Circuit, will continue to have the opportunity to decide the issue and are likely to follow the decision below.

2. The Second Circuit, in the decision below, remanded the case for a plenary hearing under the appropriate legal standard, stating that "further development must await concrete factual

situations as they arise." Appendix of Petitioner at 24a. Review by the Court would be necessary only in the event that the quantum of evidence produced at the hearing by Mr. Stevic would cause a different result under the legal standards in contention, an inquiry that the Board of Immigration Appeals is undertaking in such cases, as appears, infra, at page 8.

3. Furthermore, the decision below is clearly correct. The Second Circuit ruled that the standard for withholding an alien's deportation to a particular country on the ground that that alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, had been changed by the passage of the Refu-

gee Act of 1980, which was inspired by the accession of the United States to the 1967 Protocol Relating to the Status of Refugees of the United Nations.^{1/} The 1980 Act provided, for the first time, a definition of the term "refugee," as:

... any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42).

A corresponding definition of the term "refugee" appears in the Protocol at Article 1(2), which was included in

^{1/} The United States acceded to the Protocol in 1968. 19 U.S.T. 6223; T.I.A.S. No. 6577.

pertinent part in the accession of the United States.

In interpreting the term "refugee," the Second Circuit referred to the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979) (hereinafter "Handbook") as a distillation of the "High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject." Appendix of Petitioner at 15a.^{2/}

The international experience teaches that the formulation "well-

2/ The Board of Immigration Appeals has itself treated the Handbook as a significant source of guidance as to the meaning of the Protocol. Matter of Rodriguez-Palma, Interim Decision No. 2815 (BIA 1980).

founded fear of persecution" requires both a subjective state of mind and an objective, external situation that tends to confirm that state of mind. Handbook at ¶39.^{3/} As to the subjective element, a sensitive inquiry into an alien's "personality" is required in order to ascertain whether the predominant motive for the asylum claim is fear. Handbook at ¶s 40 and 41. As to the objective element, an alien must normally show "good reason why he individually fears persecution." Handbook at ¶45.

The withholding of deportation statute at issue in the decision below also underwent substantial change in the Refugee Act of 1980 in order to conform

^{3/} The pertinent provisions of the Handbook appear in an appendix submitted herewith.

the prior provision with its analogue under the Protocol. The statute now reads:

The Attorney General shall not deport or return any alien... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1253(h).

The corresponding provision in the Protocol provides:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Article 33(1).

As the prohibition concerns "refugees", the "well-founded fear" standard obtains, as the Second Circuit recognized in the decision below.

4. It is unclear whether the Third Circuit would have decided Rejaie differently had it not reached the refugee standard issue, in view of its finding that the alien had failed to respond to the Board's determination that he had not submitted sufficient, new evidence, as required by the regulations, to justify reopening his asylum claim. Appendix of Petitioner at 42a and 43a. The facial disparity in the standards in contention, moreover, is significant -- "clear probability", which focuses exclusively upon an external, objective situation; and "well-founded fear", which focuses upon a subjective state of mind and whether there are external circumstances which tend to confirm that state of mind. The Third Circuit's

efforts to reconcile the disparity are unpersuasive.^{4/}

Over time, other Circuits, perhaps including the Third Circuit, are likely to recognize the correctness of the decision below, as well as the unpersuasive character of the pronouncements in Rejaie. Indeed, the Sixth Circuit recently followed the decision below and rejected the decision in Rejaie, of which it was aware. Reyes v. INS, 693 F.2d 597 (6th Cir. 1982); Petition at 11 n.12. Other Circuits will be addressing the issue and are likely to follow the decision below. Consideration by the Court at this juncture would be premature.

5. Nor is the decision below likely to "impose a substantial

^{4/} Mr. Rejaie did not file a petition for a writ of certiorari.

administrative burden" on the agency as predicted by petitioner. In those cases in which the Board of Immigration Appeals has recently addressed the issue, the impact of refugee standard issue appears to be of little consequence. The statement in a November 1, 1982, decision by the Board of Immigration Appeals in an asylum case is typical:

An applicant for asylum or withholding of deportation must show that, if deported, he would be subject to persecution or that he has a well-founded fear of persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. Section 208(a) of the Act. See section 243(h) of the Act; Rejaie v. INS, ___ F.2d ___, Nos. 81-2375 and 82-3195 (3 ___ Cir., October 13, 1982); McMullen v. INS, 658 F.2d 1312 (9 Cir. 1981); Kashani v. INS,

547 F.2d 376 (7 Cir. 1977); Matter of Portales, Interim Decision 2905 (BIA 1982); Matter of Martinez-Romero, Interim Decision 2872 (BIA 1981); Matter of Dunar, 14 I&N Dec. 310 (BIA 1973). See also Stevic v. Sava, 678 F.2d 401 (2 Cir. 1982).

The applicant has not established that he will be persecuted or that he has a well-founded fear of persecution within the contemplation of section 208(a) or 243(h) of the Act, regardless of whether his claim is assessed in terms of whether he has demonstrated a "clear probability," a "good reason", or a "realistic likelihood." Matter of Matelot, Interim Dec. No. 2927 (BIA 1982).

In view of the position taken by the Board, the administrative impact of the issue is likely to be modest.

CONCLUSION

The petition for writ of
certiorari should be denied.

Respectfully submitted.

Lawyers Committee for
International Human
Rights
by Arthur C. Helton

February 1983

APPENDIX

Handbook on Procedures and Criteria for
Determining Refugee Status

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted" --for the reasons stated --by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One

person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences --in other words, everything that may serve to indicate that the pre-dominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

No. 82-973

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ALEXANDER L. STEVENS

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to persecution in the country of deportation.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-973

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-25a) is reported at 678 F.2d 401. The order of the court of appeals denying rehearing (Pet. App. 1a-3a) is not reported. The decisions of the Board of Immigration Appeals (Pet. App. 27a-36a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a) was entered on May 5, 1982, and a petition for rehearing was denied on July 29, 1982 (Pet. App. 1a-3a). On October 22, 1982, Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including December 10, 1982. The petition for a writ of certiorari was filed on December 10, 1982, and was granted on February 28, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. (Supp. V) 1253(h) (1) provides in pertinent part:

The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. Respondent is a 32-year old native and citizen of Yugoslavia. He entered the United States on June 8, 1976, as a nonimmigrant visitor authorized to remain until July 25, 1976. Because he stayed in this country beyond that date without permission, deportation proceedings were instituted against him in November 1976. At the deportation hearing, respondent admitted deportability and requested and was granted the privilege of voluntarily departing the United States by February 16, 1977. Respondent designated Yugoslavia as the country to which he wished to be deported. Pet. App. 5a-6a; R. 179, 182, 184-185.¹

Respondent did not leave this country by February 16, 1977. Rather, in January 1977, he married a United States citizen, who filed a visa petition on his behalf. The Immigration and Naturalization Service approved the visa petition on April 5, 1977. Five days later, however, respondent's wife was killed in an automobile accident, which automatically revoked the INS's approval of the visa petition. See 8 C.F.R. 205.1(a)(2). Respondent requested the district director of the INS to reinstate the approval, but that request was denied on August 11, 1977, and respondent was ordered to surrender for deportation. Pet. App. 6a-7a; R. 159-160.

¹ "R." refers to the certified administrative record in the court of appeals.

2. Instead of surrendering or seeking review of the district director's decision, respondent moved to reopen his deportation proceedings in order to apply for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h).² Respondent alleged that he feared persecution and imprisonment if he were returned to Yugoslavia because of his friendship with members of, and assistance in the work of, Ravna Gora, an anticommunist organization, and because his father-in-law, who was a member of Ravna Gora, had been imprisoned in Yugoslavia on account of his anticommunist activities when he visited there as a tourist in 1974. Respondent submitted his affidavit in support of these allegations. Pet. App. 7a-8a; R. 156.³ Respondent explained that he had not requested withholding of deportation at his deportation hearing, and had designated Yugoslavia as the country to which he wished to be deported at that time, because he did not become involved in anticommunist activities until his marriage, which occurred after he had been found deportable.⁴

On October 17, 1979, an immigration judge denied respondent's motion to reopen his deportation proceedings. Characterizing respondent's affidavit as self-serving and conclusory, the judge held that respondent had failed

² The version of Section 243(h) that was in effect in 1977, when respondent filed his first motion to reopen, is set forth in note 10, *infra*.

³ While his motion to reopen was pending before the immigration judge, respondent also applied to the district director for asylum. The district director denied respondent's application on August 1, 1979 (Pet. App. 8a).

⁴ This explanation is not wholly convincing. Respondent subsequently testified that he knew his late wife for six months prior to their marriage in January 1977. Transcript of July 27, 1981 proceedings on respondent's habeas corpus petition, at 42. Accordingly, respondent is likely to have been aware of the circumstances surrounding his future father-in-law's imprisonment in Yugoslavia when he designated that country as the country to which he wished to be deported during his December 1976 deportation proceeding. Nevertheless, respondent did not mention his future wife or her father during his deportation hearing. See R. 176-183.

to provide any substantial evidence that he would be subjected to persecution in Yugoslavia. Pet. App. 8a; R. 150-152.

On January 18, 1980, the Board of Immigration Appeals dismissed respondent's appeal from the immigration judge's decision and denied respondent's motion to reopen (Pet. App. 32a-36a). The Board noted (*id.* at 34a-35a) that "[a] motion to reopen based on a section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual [alien]." It concluded that respondent had failed to make the required showing because evidence of his membership in Ravna Gora, his father-in-law's incarceration in Yugoslavia, and the conviction in Yugoslavia of an unrelated American citizen associated with an anticommunist organization did not prove that respondent himself would be singled out for persecution if he returned to Yugoslavia. Pet. App. 35a-36a.⁵ Respondent did not seek review of this decision of the Board.

3. In February 1981, the INS again ordered respondent to surrender for deportation. Once again, respondent neither complied nor sought an extension of time. He was arrested by INS officers in Chicago on July 17, 1981, and flown to New York for deportation. While awaiting a connecting flight to Yugoslavia, respondent attempted to escape. Accordingly, he was detained by the INS and his deportation was rescheduled. Pet. App. 8a-9a.

On July 21, 1981, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The district

⁵ On appeal to the Board of Immigration Appeals, respondent presented a newspaper clipping that reported that another Yugoslav, an American citizen unrelated to respondent, had been sentenced to five years' imprisonment in Yugoslavia. Respondent also submitted a copy of the oath of allegiance that he had taken when he joined an anticommunist organization in February 1977 and a declaration in which he stated his reasons for joining the organization. Pet. App. 28a-29a; R. 148-149.

court limited its review to the question whether the district director had abused his discretion by refusing to reinstate approval of the visa petition filed by respondent's late wife on his behalf. The district court concluded there had been no abuse of discretion and denied respondent's petition. Pet. App. 9a.

While detained by the INS, respondent also filed a second motion to reopen his deportation proceedings in order to renew his request for withholding of deportation under Section 243(h). On September 3, 1981, the Board denied respondent's motion (Pet. App. 27a-31a). The Board observed that although the basis for respondent's second motion to reopen—that he would be persecuted in Yugoslavia because of his associations with the Ravna Gora organization—was identical to that of his prior motion to reopen, respondent had made no showing that the evidence submitted in support of his second motion was unavailable to him and could not have been discovered or presented at a former hearing or that conditions in Yugoslavia had changed substantially since the earlier motion (*id.* at 30a). See 8 C.F.R. 3.2; *Kashani v. INS*, 547 F.2d 376, 380 (7th Cir. 1977).⁶

In addition, the Board held that respondent had failed to make a prima facie showing that he would be singled out for persecution if he were deported to Yugoslavia. Pet. App. 31a. The Board noted (*ibid.*) that “[a] motion to reopen based on a Section 243(h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual * * *.” The Board concluded that respondent had failed to make the required showing because the journalistic articles submitted by respondent (see note 6) were “of a general nature, referring to political con-

⁶ In support of respondent's second motion to reopen, he submitted various articles describing the political conditions in Yugoslavia in general and several affidavits of individual Yugoslavs who averred that respondent would be imprisoned if he returned to Yugoslavia. R. 27-139.

ditions in Yugoslavia, but not specifically relating to the respondent," and the affidavits and petitions submitted by individual Yugoslavs (see *ibid.*) "express an opinion [that respondent will be imprisoned if he returns to Yugoslavia] but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in Yugoslavia." Pet. App. 31a.⁷

4. In a consolidated proceeding in the court of appeals, respondent appealed the district court's denial of his habeas petition and sought review of the Board's most recent denial of his motion to reopen. The court of appeals upheld the district court's denial of respondent's petition (Pet. App. 10a-11a). However, the court of appeals reversed the Board's denial of respondent's motion to reopen, concluding that the Board had applied too stringent a standard in evaluating respondent's claim of persecution in support of his request for withholding of deportation (*id.* at 11a-25a).

While acknowledging that "the matter is hardly free from doubt" (Pet. App. 12a), the court of appeals held that the enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, represented the culmination of a process, which had begun with the United States' accession in 1968 to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, of modifying the standard applicable to requests for relief under Section 243(h). Pet. App. 21a. In the court's view (*id.* at 14a), the "'well-founded fear of persecution'" language con-

⁷ Respondent also had claimed that if he returned to his home town, Gnjilane, Yugoslavia, he, as a Serbian, would be killed by the Albanians, who constituted a majority in the province and were attempting to secede from Yugoslavia. The Board rejected this claim as well, finding that "there is nothing to stop the respondent from going to another town in Yugoslavia should he feel threatened in his hometown. A respondent is deported to [a] country, not a city or province." Pet. App. 31a.

tained in the Protocol "seems considerably more generous than the 'clear probability' test applied under Section 243(h)." Accordingly, without providing any additional guidance concerning the content of the new standard,⁸ the court concluded (Pet. App. 23a) that "under Section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution." It remanded the case to the Board for a "plenary hearing under the legal standards established by the Protocol." Pet. App. 25a (footnote omitted), 26a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States traditionally has had one of the most generous and compassionate refugee programs of any nation. Even before accession to the United Nations Protocol Relating to the Status of Refugees in 1968 and passage of the Refugee Act of 1980, several statutory and regulatory provisions of our immigration laws permitted aliens who feared persecution abroad either to be admitted to this country or, once here, to avoid deportation to a country of persecution. Indeed, it was because of the "American heritage of concern for the homeless and persecuted and our traditional role of leadership in promoting assistance for refugees" (S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968)) that we were able to

⁸ The court expressly left the formulation of an appropriate standard for development on an ad hoc, case-by-case basis (Pet. App. 24a):

It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. It emphasizes the fear of the applicant as well as the reasonableness of that fear. Its further development must await concrete factual situations as they arise. That development can be informed by traditional indices of legislative intent, by the [Office of the United Nations High Commissioner for Refugees'] *Handbook [on Procedures and Criteria for Determining Refugee Status (Geneva, 1979)]* and by experience.

accede to the United Nations Protocol "without prejudice to national or state law" (114 Cong. Rec. 29608 (1968) (remarks of Sen. Proxmire)).

The provision with which this case is primarily concerned, Section 243(h) of the Immigration and Nationality Act, authorizes withholding of deportation of aliens within the United States who wish to avoid deportation to a country in which their lives or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group. Since at least the early 1960s, an alien seeking such relief was required to show a realistic likelihood—denominated by the courts as a "clear probability"—that he would be subject to such persecution if deported. The Second Circuit has held that, by Congress's use of the words "well-founded fear" of persecution in the Refugee Act of 1980, if not by our accession in 1968 to the Protocol, which contains the identical language, that burden of proof has now been altered.

As we show below, however, the words "clear probability" and "well-founded fear" are not self-explanatory, but when they are read in the context in which they have been used it becomes obvious that there is no significant difference between them. Moreover, the unambiguous intent underlying both accession to the Protocol in 1968 and passage of the Refugee Act of 1980 was *not* to change the standard for eligibility for withholding of deportation relief. In view of this explicit legislative desire to maintain the status quo, and the recognition that the various verbal formulations for the burden of proof can only be understood in the context of their actual applications, we begin with the pre-1968 standard for proving eligibility for withholding of deportation relief.

A.

Prior to the United States' accession to the Protocol in 1968, an alien seeking withholding of deportation was required to substantiate his subjective fear of persecution

with objective facts demonstrating a realistic likelihood that he would be singled out for persecution. Such evidence could take the form of, for example, proof of previous persecution of the individual alien or persecution of his family, evidence of persecution of all or virtually all members of a group to which the alien belonged, or evidence of activities engaged in by the alien after he left a country that indicated a likelihood that he would be persecuted if he returned there. Whereas the Board of Immigration Appeals and the INS generally described the foregoing showing as a "likelihood of persecution," the courts frequently denominated it a "clear probability of persecution."

B.

The United States' accession to the Protocol was neither intended to change, nor construed as changing, the foregoing burden of proof. To the contrary, accession was based on the express understanding that such action would not alter or enlarge the substance of our immigration laws since, it was believed, the principles and directives contained in the Protocol already were incorporated in United States law. Accession instead was intended as a symbol and as encouragement to other nations to treat refugees in the same salutary manner in which the United States already dealt with those within its territory.

Largely in reliance on this express basis for accession, during the period between 1968 and the enactment of the Refugee Act in 1980, both the Board and the courts construed the "well-founded fear" language contained in the Protocol as not having altered the standard by which an alien was required to prove eligibility for withholding of deportation. Even those cases that did not expressly hold that accession had made no change in the applicable standard nevertheless continued to use the phrases "likelihood of persecution" and "clear probability of persecution" interchangeably with the Protocol's "well-founded fear" terminology, thus indicating no significant

differences among the various formulations. Regardless of the semantic standard applied, an alien seeking withholding of deportation remained under an obligation to show, by objective evidence, a realistic likelihood that he would be singled out for persecution if deported.

C.

Congress's explicit intent in enacting the portions of the Refugee Act with which this case is concerned was simply to conform United States law to the terms of the Protocol. Specifically, Congress amended Section 243(h) "for the sake of clarity, to conform the language of that section to the [1951 United Nations] Convention [Relating to the Status of Refugees, Articles 2 through 34 of which are incorporated by reference in the Protocol]." H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 18 (1979). Similarly, the new definition of "refugee" was added to the Act to conform to that contained in the Protocol by eliminating the geographical and ideological limitations imposed by former Section 203(a) (7), 8 U.S.C. 1153(a) (7).

Since Congress's sole purpose, in enacting the relevant portions of the Refugee Act, was to incorporate the provisions of the Protocol, and since accession to the Protocol had not been intended to alter the substance of our immigration laws, it follows that the Refugee Act did not change the standard by which an alien was required to prove eligibility for withholding of deportation. Similarly, the fact that the words "well-founded fear," as used in the Protocol, had been consistently construed as equivalent to the pre-1968 standard conclusively refutes any suggestion that Congress's use of that phrase in the Refugee Act was intended to denote a departure from that standard.

D.

Following enactment of the Refugee Act, the Board has continued to use the phrases "likelihood of persecution" and "clear probability of persecution," as well as "well-founded fear of persecution," thus signifying its under-

standing that the legislation did not alter the standard by which an alien is required to establish eligibility for relief under Section 243(h). This construction of the Act by the agency charged with its administration is entitled to substantial deference.

The court of appeals' holding (Pet. App. 23a) that the Refugee Act requires withholding of deportation under Section 243(h) upon a showing "far short of a 'clear probability' " that an alien will be singled out for persecution attributes a stringency to the phrase "clear probability" that ignores how it has been applied in practice. The decision below thus liberalizes substantially the standard by which aliens' withholding and asylum claims must be assessed. This ruling is in direct contravention of the intent underlying both the United States' accession to the Protocol and the enactment of the Refugee Act and should not be accepted by this Court.

ARGUMENT

THE REFUGEE ACT OF 1980 DID NOT CHANGE THE STANDARD AN ALIEN MUST MEET IN ORDER TO AVOID DEPORTATION ON THE GROUND THAT HE WOULD BE SUBJECT TO PERSECUTION IN THE COUNTRY OF DEPORTATION

A. The United States Traditionally Has Had A Generous And Compassionate Refugee Policy

1. Perhaps because of our Nation's history and heritage, "few, if any, countries have been as generous as the United States in extending the privilege to immigrate, or in providing sanctuary to the oppressed" (*Fiallo v. Bell*, 430 U.S. 787, 795 & n.6 (1977)). See also 125 Cong. Rec. 4881 (1979) (remarks of Sen. Kennedy); S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4, 6 (1968). Even before the enactment of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, several statutory provisions and regulations of our immigration laws permitted aliens who feared persecution either to be ad-

mitted to this country or, once here, to avoid deportation to a country of probable persecution.

Relief for aliens seeking to come to the United States because of persecution in their homelands was available under Section 203(a) (7) of the Immigration and Nationality Act, 8 U.S.C. 1153(a) (7), which permitted the "conditional entry" as immigrants of 17,400 refugees annually.⁹ Those seeking entry under this provision were required to show, *inter alia*, that, because of persecution or fear of persecution on account of race, religion, or political opinion, they had fled from a Communist or Communist-dominated country or area or from any country in the Middle East. 8 U.S.C. 1153(a) (7) (A) (i). Aliens who arrived as conditional entrants were required to report back to the INS after two years for reinspection and reexamination for admission into the United States. 8 U.S.C. 1153(g). An alien who passed that review would be "regarded as lawfully admitted to the United States for permanent residence as of the date of his arrival." 8 U.S.C. 1153(h).

Because of the numerical and other limitations on entry under Section 203(a) (7), another provision of the Act, Section 212(d) (5), 8 U.S.C. 1182(d) (5), also was used to bring refugees into this country. That section granted the Attorney General discretion to "parole" aliens into the United States "temporarily * * * for emergent reasons or for reasons deemed strictly in the public interest." 8 U.S.C. 1182(d) (5). Parole, however, was not regarded as an "admission" of the alien and when, in the opinion of the Attorney General, the purposes of the parole had been served, the alien was to be returned

⁹ As originally enacted, Section 203(a) (7) made 10,200 admissions available annually to refugees. By the end of 1978, Congress had amended the Immigration and Nationality Act to provide a single worldwide preference system, and refugees then claimed 17,400 admissions annually. D. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 Mich. Yearbook of Int'l Legal Studies 91, 116 n.11.

to the custody from which he had been paroled. Thereafter, his case would be dealt with "in the same manner as that of any other applicant for admission to the United States." *Ibid.* This provision was first used in 1956, in response to the Hungarian crisis, and was used thereafter by successive administrations to parole large numbers of refugees into the United States. H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 3-4 (1979).

By contrast to Sections 203(a)(7) and 212(d)(5), Section 243(h) of the Act, 8 U.S.C. 1253(h), the provision with which this case is primarily concerned, applied to aliens already in this country who wished to avoid deportation. Section 243(h) authorized the Attorney General to withhold the deportation of an alien if, in the Attorney General's judgment, "the alien would be subject to persecution on account of race, religion, or political opinion."¹⁰ Withholding of deportation was available only to those aliens who were already "within the United States" and subject to deportation proceedings. Such relief thus was not available to aliens who were not considered to be admitted to the United States or who were at our borders applying for admission to, and refuge in, this country. See *Leng May Ma v. Barber*, 357 U.S. 185 (1958) (alien paroled into this country under 8 U.S.C. 1182(d)(5) not "within the United States" for purposes

¹⁰ 8 U.S.C. 1253(h) provided:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

From 1952 to 1965, Section 243(h) authorized the withholding of deportation of only those aliens who would be subject to "physical persecution" in the country of deportation. 8 U.S.C. (1964 ed.) 1253(h). In 1965, Congress amended the section by substituting the words "persecution on account of race, religion, or political opinion" for the words "physical persecution." Pub. L. No. 89-236, Section 11(f), 79 Stat. 918.

of Section 243(h)). By its terms, Section 243(h) provided only temporary relief; the Attorney General was authorized to withhold deportation of an alien only "for such period of time as he deem[ed] to be necessary" for reasons of persecution. 8 U.S.C. 1253(h). Moreover, withholding of deportation relief afforded no affirmative right to remain in this country, but only a right not to be deported to a particular country or countries. Finally, unlike Section 203, Section 243(h) contained no provision for eventual adjustment to lawful permanent resident status.

Prior to the enactment of the Refugee Act of 1980, there was no statutory provision whereby aliens at our borders or within this country (but not yet the subject of deportation proceedings) could apply for asylum. Nevertheless, in 1974, the Attorney General, pursuant to his general authority to administer and enforce the immigration laws (8 U.S.C. 1103), promulgated a regulation that permitted aliens to apply to an INS district director or American consul for "asylum." 8 C.F.R. 108 (1975).¹¹

2. In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, which requires (19 U.S.T. 6225) all parties to undertake to apply Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.¹² Article 33.1 of the Convention provides (19 U.S.T. 6276):

No Contracting State shall expel or return * * * a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, national-

¹¹ This regulatory provision was revoked in 1981 (see 46 Fed. Reg. 45117) after the Refugee Act of 1980 created a statutory scheme for the granting of asylum (see pages 18-19, *infra*).

¹² The United States is not a party to the Convention itself.

ity, membership of a particular social group or political opinion.^[13]

Article 1.2 of the Protocol, largely incorporating by reference Article 1A(2) of the Convention, in turn defines a "refugee" as one who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

19 U.S.T. 6225, 6261. Because of the "American heritage of concern for the homeless and persecuted and our traditional role of leadership in promoting assistance for refugees" (S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968)) already reflected in our immigration laws, the United States was able to accede to the Protocol "without prejudice to national or state law" (114 Cong. Rec. 29608 (1968) (remarks of Sen. Proxmire)).

3. In the Refugee Act of 1980, Congress made extensive revisions in the immigration laws in order to establish a permanent systematic procedure for the admission of refugees to the United States and for their resettlement once here. S. Rep. No. 96-590, 96th Cong., 2d Sess. 1 (1980).

The Refugee Act was the product of congressional dissatisfaction and frustration with the ad hoc, piecemeal and discriminatory nature of the conditional entry procedure and the consequent use by the Attorney General

¹³ Article 32.1 of the Convention (19 U.S.T. 6275) extends broader relief (a general right not to be expelled) to refugees *lawfully* within the territory of a contracting party: "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

of his "parole" power (which had been designed to be used only on an individual, case-by-case basis) to bring in large numbers of refugees.¹⁴ Congress responded to these concerns by eliminating entirely the conditional entry provision for aliens fleeing from Communist or Middle Eastern countries contained in Section 203(a)(7) of the Act, 8 U.S.C. 1153(a)(7), and by placing stringent restrictions on the Attorney General's authority to "parole" refugees into the United States.¹⁵ In their stead, Congress created new statutory provisions dealing with refugees seeking admission to this country. Pub. L. No. 96-212, Sec. 201(b), 94 Stat. 103.

Under new Section 207, 8 U.S.C. (Supp. V) 1157, a certain number of aliens who are screened and selected overseas may be brought to the United States under the

¹⁴ See, e.g., *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (1979) (remarks of Rep. Holtzman) ("our refugee policy up to this time has been haphazard and inadequate. Current programs are the result of ad hoc responses of our Government to refugee crises that have existed throughout the world—in Hungary, Cuba, Eastern Europe, or Indochina"); *The Refugee Act of 1979, S. 643: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (remarks of Sen. Kennedy) ("[f]or too long our policy toward refugee assistance has been ad hoc, with refugees being admitted in fits and starts, and after long delays and great human suffering * * *"), 10-11, 69-70 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 2, 5 (1979); 125 Cong. Rec. 23240 (1979) (remarks of Sen. Boschwitz) ("[o]ur policy today lacks consistency and planning. We respond to crises on a case-by-case basis with no established policy or statute that guides our actions").

¹⁵ In Congress's view, the addition to the Act of new Sections 207 and 208 described in the text eliminated the need for the Attorney General to parole large groups of refugees into the United States. Accordingly, it amended the parole provision to require the Attorney General, prior to paroling an alien who is a refugee, to make a determination that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under [Section 207]." 8 U.S.C. (Supp. V) 1182(d)(5)(B).

new status of "refugees." Pub. L. No. 96-212, Sec. 201(b), 94 Stat. 103. Like conditional entrants under former Section 203(a) (7), "refugees" under Section 207 must submit to reinspection by the Immigration and Naturalization Service after an initial period before gaining permanent resident alien status. However, the period before adjustment to permanent resident status is reduced from two years to one. 8 U.S.C. (Supp. V) 1159 (a). Moreover, unlike the 17,400 numerical limitation on conditional entrants under repealed Section 203(a) (7), new Section 207 permitted "refugee" admissions of up to 50,000 per year for fiscal years 1980 through 1982. 8 U.S.C. (Supp. V) 1157(a) (1).¹⁶ For subsequent fiscal years, the numerical ceiling must be fixed by Presidential determination. 8 U.S.C. (Supp. V) 1157(a) (2). During each fiscal year, an additional number of refugees may be admitted if the President determines, in consultation with Congress, that an unforeseen emergency situation exists, that the admission to the United States of additional refugees is justified by grave humanitarian concerns or is otherwise in the national interest, and that their admission cannot be accomplished within the refugee admission ceiling established before the beginning of the fiscal year. 8 U.S.C. (Supp. V) 1157(b).

Most significantly, the geographical and ideological requirements for conditional entry were repealed and a definition of "refugee" that incorporates the definition contained in the United Nations Protocol was, for the first time, included in the Act (8 U.S.C. (Supp. V) 1101 (a) (42)) :

¹⁶ The Act authorized entries beyond these numerical limitations if the President determined, after consultation with Congress and before the beginning of the fiscal year, that admission of a specific number of refugees in excess of 50,000 was justified by humanitarian concerns or was otherwise in the national interest. 8 U.S.C. (Supp. V) 1157(a) (1). For fiscal years 1980, 1981 and 1982 the President in fact made such determinations and approved the admission of more than 50,000 refugees in each of those years.

The term "refugee" means (A) any person who is outside the country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.¹⁷

Finally, admission numbers are to be allocated among categories of refugees in accordance with a determination made by the President after consultation with Congress. 8 U.S.C. (Supp. V) 1157(a) (3). The actual admission of individual refugees remains the responsibility of the Attorney General. 8 U.S.C. (Supp. V) 1157(c) (1).

In response to criticism that the bill, as originally proposed, contained no provision for asylum,¹⁸ the Judiciary

¹⁷ As noted above, the definition of refugee quoted in the text incorporates the definition of refugee contained in the United Nations Protocol Relating to the Status of Refugees, to which the United States had acceded in 1968. See pages 14-15, *supra*. The 1980 legislation went further than the Protocol, however, in, among other things, recognizing that, "in special circumstances," one can be a refugee within, as well as outside of, his country of nationality. 8 U.S.C. (Supp. V) 1101(a) (42) (B) thus defines the term refugee to include, "in such special circumstances as the President after appropriate consultation [with Congress] may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

The final sentence of 8 U.S.C. (Supp. V) 1101(a) (42) (B) precludes one who himself has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" from qualifying for refugee status.

¹⁸ See, e.g., *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of*

Committees of both Houses included a provision dealing with asylum claims. See S. Rep. No. 96-256, 96th Cong., 1st Sess. 9 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 17-18 (1979). Under new Section 208, 8 U.S.C. (Supp. V) 1158, the Attorney General is directed to establish procedures whereby any alien physically present in the United States or at a land border or port of entry, regardless of the legality of his status, may apply for "asylum" in this country. Pub. L. No. 96-212, Sec. 201(b), 94 Stat. 103.¹⁹ The threshold test for eligibility for asylum is the alien's meeting the new statutory definition of "refugee." See 8 U.S.C. (Supp. V) 1159(a). But while the Act directs the Attorney General to establish procedures whereby aliens may apply for asylum, the decision whether to grant a particular asylum application remains discretionary with the Attorney General. 8 U.S.C. (Supp. V) 1158(a). In addition, asylee status may be terminated if the conditions that rendered the alien eligible for asylum change. 8 U.S.C. (Supp. V) 1158(b). The Attorney General thus has provided that aliens who are granted asylum must be examined by the INS each year in order to determine if they continue to be eligible for asylum. 8 C.F.R. 208.8(e). Furthermore, in any year only 5,000 aliens who have been granted asylum may have their status adjusted to that of permanent resident alien. 8 U.S.C. (Supp. V) 1159(b).

Finally, the withholding of deportation provision contained in Section 243(h), 8 U.S.C. 1253(h) (see note 10,

the House Comm. on the Judiciary, 96th Cong., 1st Sess. 170, 174, 187-188, 190, 250, 364, 384 (1979); *The Refugee Act of 1979*, S. 643: *Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 52, 182 (1979). See also *Admission of Refugees Into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977).

¹⁹ Such procedures have been promulgated and are codified at 8 C.F.R. 208.

supra), was amended to conform to Article 33 of the United Nations Convention. H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 18 (1979). The Attorney General accordingly is prohibited from deporting or returning any alien to a country where his "life or freedom would be threatened" on account of "race, religion, nationality, membership in a particular social group, or political opinion." Pub. L. No. 96-212, Sec. 203(e), 94 Stat. 107.²⁰

B. Prior To The United States' Accession To The United Nations Protocol In 1968, The Board Of Immigration Appeals And The INS Required An Alien Seeking Withholding Of Deportation To Prove A Realistic Likelihood That He Would Be Subject To Persecution In The Country Of Deportation

The issue in this case concerns the meaning of the phrase "well-founded fear of persecution" in the Refugee Act of 1980.²¹ As with any case involving the interpreta-

²⁰ 8 U.S.C. (Supp. V) 1253(h) (1) provides:

The Attorney General shall not deport or return an alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

The amendments to Section 243(h) thus make explicit that the Attorney General has a mandatory duty not to deport or return an alien eligible for withholding of deportation and that the provision is applicable to exclusion as well as deportation proceedings and to aliens who would be subject to persecution on account of nationality or membership in a particular social group, as well as those who would be persecuted because of race, religion or political opinion.

²¹ We note that, by its own terms, Section 243(h) of the Act, 8 U.S.C. (Supp. V) 1253(h), suggests no change in the standard by which an alien must prove eligibility for withholding of deportation, since it neither includes nor incorporates by reference the "well-founded fear" language on which the court of appeals based its decision. (Section 243(h), as amended by the Refugee Act, prohibits the deportation or return of an alien to any country in which his life or freedom "would be threatened * * * on account of race, religion, nationality, membership in a particular social group,

tion of an Act of Congress, the Court's task is to discern and give effect to legislative intent. The usual starting place for such an endeavor is the language of the statute itself. See *Haig v. Agee*, 453 U.S. 280, 290 (1981); *Howe v. Smith*, 452 U.S. 473, 480 (1981). Here, however, the critical statutory language is far from plain; the words "well-founded fear of persecution," like the words "extreme hardship" (8 U.S.C. 1254(a)(1)), "are not self-explanatory." *INS v. Wang*, 450 U.S. 139, 144 (1981). As the Third Circuit observed in *Rejaie v. INS*, 691 F.2d 139, 146 (1982) (Pet. App. 53a), quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.), such a phrase "is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." We agree with the Third Circuit (*Rejaie v. INS*, *supra*, 691 F.2d at 146 (Pet. App. 53a)) that, when read "within the circumstances of [their] use," the phrases "clear probability" and "well-founded fear" are equivalent. Hence, Congress in passing the Refugee Act did not intend to liberalize the standard applicable to claims for withholding of deportation on grounds of persecution.²²

or political opinion"). As noted above (page 19, *supra*), however, "well-founded fear" is the criterion for eligibility for asylee status (8 U.S.C. (Supp. V) 1159(a)). The Board has held that the standards for eligibility for asylum and withholding of deportation are identical notwithstanding that asylum is discretionary with the Attorney General and withholding relief under Section 243(h) is mandatory for an eligible alien. See *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA June 30, 1981), slip op. 6, aff'd, *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982); *In re Lam*, Interim Dec. No. 2857 (BIA Mar. 24, 1981), slip op. 4-5; *In re McMullen*, 17 I. & N. Dec. 542, 544 (BIA 1980), rev'd on other grounds, *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981); see also 8 C.F.R. 208.3 (asylum requests filed with the immigration court "shall also be considered as requests for withholding exclusion or deportation pursuant to section 243(h) of the Act").

²² Accord, *Marroquin-Manriquez v. INS*, 699 F.2d 129, 133 (3d Cir. 1983), petition for cert. pending, No. 82-1649 (filed Apr. 7,

In seeking guidance as to the meaning of the words "well-founded fear of persecution," it is appropriate at the outset to consider the construction that has been placed on that phrase in the United Nations Protocol. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Moreover, inquiry into the Protocol's use of the same words is required by Congress's express intent, by enactment of the Refugee Act, to conform United States law to our international obligations under the Protocol. See pages 36-40, *infra*. In turn, as we show below (pages 25-28), this country's accession to the Protocol in 1968 was predicated on the explicit understanding that such action would not alter or enlarge the substance of our immigration laws. Accordingly, we begin with an examination of the pre-1968 standard for eligibility for withholding of deportation.

An alien seeking withholding of deportation or asylum always had the burden of proving that he would be subject to persecution in the country of deportation. *In re Nagy*, 11 I. & N. Dec. 888, 889 (BIA 1966); *In re Sihasale*, 11 I. & N. Dec. 759, 760-762 (BIA 1966); *In re Perez*, 10 I. & N. 603, 605 (BIA 1964).²³ More spe-

1983); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977); *In re Dunar*, 14 I. & N. Dec. 310, 319-320 (BIA 1973); see also *Raass v. INS*, 692 F.2d 596 (9th Cir. 1982) (post-Refugee Act case applying standard of "probable political persecution as decided under the heretofore decided cases"); *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981) (post-Refugee Act case applying "likelihood of persecution" standard). Contra, *Reyes v. INS*, 693 F.2d 597, 599-600 (6th Cir. 1982) (relying on the decision under review).

²³ 8 C.F.R. 242.17(c) (1965) provided in relevant part:

The [applicant for withholding of deportation] has the burden of satisfying the special inquiry officer that he would be subject to physical persecution as claimed.

Current Section 242.17(c) provides:

cifically, the INS's assessment of an alien's case consistently focused on whether his alleged fear of persecution was supported by objective facts that demonstrated a realistic likelihood that he would be singled out for persecution. The applicant thus was required not only to state his subjective fears of persecution but also to substantiate them with objective evidence. That evidence could take various forms, such as proof of previous persecution of the individual alien or persecution of his family,²⁴ evidence of persecution of all or virtually all members of a group or class to which the alien belonged,²⁵ or evidence of activities engaged in by the alien

The [applicant for withholding of deportation] has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion as claimed.

See also 8 C.F.R. 208.5 (1982); 8 C.F.R. 108.3 (1981).

²⁴ Compare *In re Janus and Janek*, 12 I. & N. Dec. 866 (BIA 1968) (Czechoslovakian anti-communists who were convicted and sentenced, in absentia, on charges of "Defection from the Republic" entitled to withholding of deportation), with *In re Nagy*, 11 I. & N. Dec. 888, 889-890 (BIA 1966) (withholding of deportation to Hungary not justified on religious grounds, in the absence of evidence that alien's parents, who also were devout practicing Catholics, had ever been subject to persecution in Hungary, or on grounds of political opinion, in the absence of evidence of any political activity by the alien either in Hungary or the United States); and *In re Sihasale*, 11 I. & N. Dec. 759, 761-762 (BIA 1966) (rejecting Indonesian citizen's claim that she would be subject to persecution by communists if returned to Indonesia because of her prior employment with an agency of the United States government, in view of the elimination of the Communist Party as an organized political force in that country and the absence of any evidence of persecution of the alien (before she left Indonesia) or her family (who remained in Indonesia)).

²⁵ Compare *In re Salama*, 11 I. & N. Dec. 536 (BIA 1966) (evidence of a government campaign that was responsible for the departure of some 37,000 Jews from Egypt since 1954, and evidence that the Medical Association of Egypt had advised the Egyptian populace to refrain from consulting Jewish physicians and that

after he had left a country that indicated a likelihood that he would be persecuted if he returned.²⁶ Whatever type of evidence was proffered, however, had to provide some indication that the particular alien would be singled out for persecution upon his return.²⁷

But while the nature of the evidence—its conclusory or subjective quality—could preclude the granting of withholding relief, the identity of its proponent could not. That is, the Board recognized that the alien's "own testimony may be the best—in fact the only—evidence available to her." Such evidence, therefore, "must * * * be

Jewish professionals had been dropped from the rolls of professional societies justified the granting of an application for withholding of deportation to Egypt of a Jew), with *Sadeghzadeh v. INS*, 393 F.2d 894, 896 (7th Cir. 1968) ("rumors" and "common knowledge" of persecution of Catholics in Iran insufficient basis for withholding of deportation); and *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967) (Turkish alien not entitled to withholding of deportation because of his Greek Orthodox faith, where such discrimination as exists in Turkey is against the Greek church rather than against individuals).

²⁶ Compare *In re Janus and Janek*, *supra*, 12 I. & N. Dec. at 871, 874-876 (Czechoslovakian alien who "ma[de] no claim that he ever publicly denounced the [Communist] Party or its goals" while in Czechoslovakia entitled to withholding of deportation on the basis of his defection and consequent conviction and sentence in absentia), with *Kasravi v. INS*, 400 F.2d 675, 676-677 (9th Cir. 1968) (holding that the BIA did not abuse its discretion in denying application for withholding of deportation of Iranian who had been "vociferous and vehement in his criticism of the Shah here in the United States," because the State Department had concluded that "an Iranian student would not in all likelihood be persecuted for activities in the United States").

²⁷ See *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968) (aliens not entitled to withholding of deportation to Hong Kong since "[t]heir status in Hong Kong as exiles from the mainland of China will not distinguish them from thousands of others, and the physical hardship or economic difficulties they claim they will face will be shared by many others. Those difficulties do not amount to the kind of particularized persecution that justifies [withholding] of deportation").

accorded the most careful and objective evaluation possible, in the light of all available pertinent evidence * * *." *In re Sihasale*, 11 I. & N. Dec. 759, 762 (BIA 1966).

The Board and the INS generally described the foregoing showing as a "likelihood of persecution." See, e.g., *In re Janus and Janek*, 12 I. & N. Dec. 866, 873 (BIA 1968); *In re Kojoory*, 12 I. & N. Dec. 215, 220 (BIA 1967); *In re Vardjan*, 10 I. & N. Dec. 567, 571, 579 (BIA 1964); *In re Diaz*, 10 I. & N. Dec. 199, 202 (BIA 1963). The courts, on the other hand, frequently denominated the required showing as a "clear probability of persecution." See *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967). In so doing, however, the courts gave no indication that they intended the "clear probability" phraseology to represent any more stringent a standard than the Board's "likelihood of persecution" formulation did. Thus, as the Third Circuit noted in *Rejaie v. INS*, *supra*, 691 F.2d at 146 (Pet. App. 52a), the court below "attributed a stringency to the phrase 'clear probability'" that is inconsistent with the Second Circuit's own observations in *Cheng Kai Fu v. INS*, *supra*, 386 F.2d at 753 (emphasis added) that "[i]n order to forestall deportation the aliens must show *some evidence* indicating they would be subject to persecution" and that they had failed to make the required showing of a "likelihood of persecution."

C. The United States' Accession To The United Nations Protocol In 1968 Did Not Alter The Standard By Which An Alien Must Establish That He Would Be Eligible For Withholding Of Deportation

1. The Senate gave its advice and consent to the United States' accession to the United Nations Protocol in 1968 on the express understanding that such action would not alter or enlarge the substance of our immigration laws. See S. Exec. Rep. No. 14, 90th Cong., 2d Sess.

4, 6, 7, 10 (1968); S. Exec. Doc. K, 90th Cong., 2d Sess. III, VIII (1968). Specifically, Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the United States Department of State, assured the Senate Foreign Relations Committee (S. Exec. Rep. No. 14, *supra*, at 6) that

accession does not in any sense commit the Contracting State to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in its prohibition under Article 33 of the Convention against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in a territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol, without amendment of the Act.

Thereafter, the Committee reported favorably on the Protocol and recommended that the Senate give its advice and consent to accession. Similarly, the President and the Secretary of State advised the Senate (S. Exec. Doc. K, *supra*, at III, VII) that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." Accord, S. Exec. Rep. No. 14, *supra*, at 2; 114 Cong. Rec. 29391 (1968) (remarks of Sen. Mansfield).²⁸ With express

²⁸ Because there appeared to be a conflict between Article 29.1 of the Convention and United States revenue laws dealing with the taxation of nonresident aliens, and between Article 24 of the Convention and certain United States social security laws, the United States acceded to the Protocol subject to two reservations. See 114 Cong. Rec. 29607 (1968). Senator Proxmire advised the Senate (*id.* at 27757; emphasis added) that the "[r]eservations in-

reference to Section 243(h), the Secretary of State explained (S. Exec. Doc. K, *supra*, at VIII) :

[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1254 [*sic*], and it can be implemented within the administrative discretion provided by existing regulations.

Accession thus never was intended to alter the substance of our immigration laws. Rather, in view of this country's long-standing tradition of concern and action on behalf of refugees, it was believed that the principles and directives contained in the Protocol already were incorporated in United States law. S. Exec. Rep. No. 14, *supra*, at 4 ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"), 6, 7 ("the United States already meets the standards of the Protocol"); S. Exec. Doc. K, *supra*, at III, VII. Accession was intended as a symbol and as encouragement to other nations to treat refugees within their borders in the same salutary manner in which the United States already dealt with those within its territory. S. Exec. Doc. K, *supra*, at III, IV, VIII; S. Exec. Rep. No. 14, *supra*, at 4, 7, 10.

In this respect, accession was thought to be a particularly appropriate action for the United States to take in 1968, which had been designated International Year for Human Rights by the United Nations and Human Rights Year in the United States (S. Exec. Doc. K, *supra*, at III).

Our accession would convey to the rest of the world in a timely and conspicuous manner, and I

cluded in the [Secretary of State's] Letter of Submittal remove even the slightest possible conflict between Federal and State law and provisions of the Convention and protocol."

cannot think of a more timely opportunity, the image of our traditional concern for refugees and for the individual human being which have long been embodied in our laws and consecrated in our traditions.

In our view, it is particularly desirable, therefore, that the United States accede during this International Year for Human Rights.

S. Exec. Rep. No. 14, *supra*, at 4. See also 114 Cong. Rec. 27757 (1968) (remarks of Sen. Proxmire) (“[s]urely [ratification of the Protocol] is the least the Senate can do during this year dedicated to internationalizing human rights”).

2. In view of the foregoing unequivocal evidence of legislative intent, both the courts and the Board construed the “well-founded fear” language of the Protocol as not altering the standard by which an alien was required to prove eligibility for withholding of deportation. In *In re Dunar*, 14 I. & N. Dec. 310, 319 (1973), the Board explained that the requirement that the fear be “‘well-founded’” meant that the alien still must substantiate his subjective fear of persecution with objective facts. Thus, as was the case before accession (see pages 22-25, *supra*), “[t]he claimant’s own testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted.” 14 I. & N. Dec. at 319. Relying largely (*id.* at 319-320; see also *id.* at 314-318) on the legislative history of accession discussed above, the Board concluded (14 I. & N. Dec. at 230) :

It is clear that when it accepted the Protocol, the Senate had no notion that this would work a drastic alteration of section 243(h) and the gloss which it had acquired through the years before this Board and in the courts.

The Board accordingly rejected the applicant’s contention that “[t]his change in terminology [to well-founded

fear of persecution] relieves the alien of the burden of showing a clear probability of persecution." 14 I. & N. Dec. at 319.²⁹ See also *In re Chumpitazi*, 16 I. & N. Dec. 629, 631 (BIA 1978); *In re Francois*, 15 I. & N. Dec. 534, 538 (BIA 1975); *In re Chukumerije*, 15 I. & N. Dec. 520, 522-523 (BIA 1975).

²⁹ Having concluded (14 I. & N. Dec. at 319-320) that the Protocol's "well-founded fear" terminology represented no substantive change from the "clear probability" formulation, the Board next held (*id.* at 320; emphasis added) that "there is no substantial difference in the coverage of section 243(h) and Article 33." That is, the Board was satisfied that the differences between Section 243(h), which applied to "persecution on account of race, religion, or political opinion," and Articles 1 and 33, which refer, in addition, to "nationality" and "membership of a particular social group," and between Section 243(h) and Article 1, which refer to persecution, and Article 33, which does not mention persecution but rather forbids expulsion of a refugee to a place where his "life or freedom will be threatened," were "clearly reconcilable" and that any "distinctions in terminology can be reconciled on a case-by-case consideration as they arise" (14 I. & N. Dec. at 320-321).

Finally, the Board concluded (14 I. & N. Dec. at 321-323) that the mandatory quality of Article 33 required no change in the nature of the determination made by the Attorney General under Section 243(h). Although the latter provision was cast in discretionary terms and had been construed by the courts as affording the Attorney General a degree of discretion in decisionmaking thereunder (see, e.g., *Muskardin v. INS*, 415 F.2d 865, 866 (2d Cir. 1969); *Kasravi v. INS*, 400 F.2d 675, 677-678 (9th Cir. 1968); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536, 537 (7th Cir. 1967)), the Board was aware of no case in which "a finding has been made that the alien has established the clear probability that he will be persecuted and in which section 243(h) withholding has nevertheless been denied in the exercise of administrative discretion." 14 I. & N. Dec. at 322; see also *id.* at 323. The Board thus suggested (*id.* at 322) that "in referring to the Attorney General's 'broad discretion' under section 243(h), the cases contemplate the manner in which the Attorney General arrives at his opinion and the limited scope of judicial review, rather than the eligibility-discretion dichotomy." Accord, *In re Francois*, 15 I. & N. Dec. 534, 536 (BIA 1975).

The question whether accession to the Protocol affected the alien's burden of proving persecution was also explicitly addressed in *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977). There, too, the court rejected the alien's contention (*id.* at 379) that, in view of this country's accession to the Protocol, "he does not need to show a clear probability of prosecution [*sic*]" (*ibid.*):

We hold that an alien claiming a "well founded fear of persecution" must either demonstrate that he actually has been a victim of persecution or that his fear is more than a matter of his own conjecture.
* * *

This requirement can only be satisfied by objective evidence that the alien's assertions are correct. Thus, the "well founded fear" standard contained in the Protocol and the "clear probability" standard which this court has engrafted onto section 243(h) will in practice converge.^[30]

See also *Pierre v. United States*, 547 F.2d 1281, 1288 (5th Cir.), vacated and remanded on other grounds, 434 U.S. 962 (1977); *Ming v. Marks*, 367 F. Supp. 673, 677 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 1170 (2d Cir. 1974).

Even where they did not expressly hold that accession to the Protocol did not alter the standard for establishing eligibility for withholding of deportation, the courts, the Board and the INS continued to use the phrases "clear probability of persecution" and "likelihood of persecution," and to use them interchangeably with the "well-

³⁰ The Second Circuit attempted (Pet. App. 18a) to minimize the force of the decision in *Kashani* by asserting that the court there "was presented with the extravagant claim that the Protocol has shifted the inquiry entirely to an assessment of the applicant's subjective state of mind." But the court below mischaracterized the alien's claim in *Kashani* as being based solely on his *subjective* fears. As the Seventh Circuit's opinion makes clear (547 F.2d at 379), the alien had conceded the authority of the Attorney General, under the Protocol, "to determine whether [the alien's] state of mind is reasonable," an inquiry that surely is not "entirely * * * subjective."

founded fear of persecution" terminology, thus indicating no significant differences among the various formulations.³¹ Hence, regardless of the label by which it was

³¹ See, e.g., *Fleurinor v. INS*, 585 F.2d 129, 132-134 (5th Cir. 1978) ("well-founded fear" used by immigration judge; "likelihood" and "probable persecution" used by court); *Martineau v. INS*, 556 F.2d 306, 307 & n.2 (5th Cir. 1977) ("clear probability of persecution" and "likelihood of persecution"); *Henry v. INS*, 552 F.2d 130, 131-132 (5th Cir. 1977) ("probable persecution," "reason to fear persecution" and "well-grounded fear of political persecution"); *Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977) ("well-founded fear"); *Zamora v. INS*, 534 F.2d 1055, 1058 (2d Cir. 1976) ("likelihood of persecution" used by court, "well founded fear" used by Board); *Daniel v. INS*, 528 F.2d 1278, 1279 (5th Cir. 1976) ("probability of persecution"); *Paul v. INS*, 521 F.2d 194, 200 & n.11 (5th Cir. 1975) ("well-founded fear of political persecution"); *Gena v. INS*, 424 F.2d 227, 232 (5th Cir. 1970) ("likely to be persecuted"); *Kovac v. INS*, 407 F.2d 102, 105, 107 (9th Cir. 1969) ("probability of persecution" and "likelihood"); *In re Williams*, 16 I. & N. Dec. 697, 700-702, 704 (BIA 1979) ("well-founded fear," "probable persecution" and "likelihood of persecution"); *In re Mladineo*, 14 I. & N. Dec. 591, 592 (BIA 1974) ("well-founded * * * fear of persecution"); *In re Maccaud*, 14 I. & N. Dec. 429, 434 (BIA 1973) ("reasonable fear" and "well-founded fear"); *In re Bohmwald*, 14 I. & N. Dec. 408, 409 (BIA 1973) ("well-founded fear of persecution"); *In re Joseph*, 13 I. & N. Dec. 70, 72, 74 (BIA 1968) ("clear probability of persecution" and "likelihood of persecution").

Notwithstanding this surfeit of case law recognizing no change in the standard by which an alien must prove eligibility for withholding of deportation, the Second Circuit relied (Pet. App. 18a) on isolated phrases taken out of context from the Fifth Circuit's decision in *Coriolan v. INS*, 559 F.2d 993 (1977). The full paragraph from which the court below culled the language on which it relied reads as follows (*id.* at 997; emphasis added):

We do not suggest that the Protocol profoundly alters American refugee law. We do believe that our adherence to the Protocol reflects or even augments the seriousness of this country's commitment to humanitarian concerns, even in this stern field of law. It may be appropriate to add that the foreign policy of the United States has recently become more dramatically focused in the protection of human rights around the world.

As noted above (pages 25-28, *supra*), the express intent behind this country's accession to the Protocol was indeed to reflect our

characterized, the same type of objective showing continued to be required of an applicant for withholding of deportation after the United States acceded to the Protocol in 1968; the alien remained under an obligation to demonstrate, by objective facts, a realistic likelihood that he would be singled out for persecution upon his return to the country of deportation.³²

traditional commitment to humanitarian concerns with respect to refugees and to augment the *seriousness* of that commitment (but not the legal commitment itself) by undertaking an international obligation to do what we already were doing as a matter of domestic law. Moreover, the result reached by the court in *Coriolan*—remand for reconsideration by the BIA—was based on a newly available Amnesty International report, not on any judicially perceived change in the alien's burden of proof. 559 F.2d at 1004.

³² Thus, after accession to the Protocol as before, an alien would be granted withholding of deportation relief if he could demonstrate that he or his family had been persecuted in his homeland or that he had engaged in activities after leaving his homeland that indicated a likelihood of persecution if he returned. See, e.g., *Berdo v. INS*, 432 F.2d 824 (6th Cir. 1970) (BIA erred in denying withholding of deportation relief to Hungarian who had participated in street fighting against the Russian Military Occupation Forces in 1956 during which, he publicly admitted since his departure from Hungary, he had killed a Russian soldier); *Kovac v. INS*, 407 F.2d 102, 105 (9th Cir. 1969) (Yugoslavian crewman who had been discriminated against in Yugoslavia because of his Hungarian extraction and because of his refusal to inform on the activities of the Hungarian underground could not be denied withholding of deportation simply because other crewmen who remained in this country after their ships had departed had not been persecuted upon their eventual return to Yugoslavia, since an alien is "entitled to a determination based upon the probability of persecution of himself, not of others"); *In re Joseph*, 13 I. & N. Dec. 70, 72 (BIA 1968) (Haitian alien who was active politically against the Duvalier regime until his departure from Haiti, who had been imprisoned on three occasions by the Duvalier regime and, while incarcerated, had suffered beatings from which scars remained on his body demonstrated that "he would be singled out as an individual by the governmental authorities and suffer persecution therefrom" if returned to Haiti). It also remained true that an alien who could not demonstrate a likelihood that he would be singled out for persecution if he returned to his homeland, either by evidence that he or his family had been persecuted, evidence

3. In concluding that the "well-founded fear of persecution" language contained in the 1980 Act mandates withholding of deportation "upon a showing far short of a 'clear probability' that an individual will be singled out for persecution," the court of appeals relied heavily (Pet. App. 15a, 23a-24a) on the *Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979) issued by the Office of the United Nations High Commissioner for Refugees (UNHCR). That reliance was wholly misplaced.

First, since the *Handbook* was not even issued until September 1979, whereas hearings on the Refugee Act were held in March and May 1979 and the Senate Judiciary Committee issued its report in July 1979, it is most unlikely that Congress's use of the words "well-founded fear of persecution" was informed by the UNHCR's interpretation of that phrase as contained in the Protocol.³³ In addition, the UNHCR itself acknowledged (*Handbook, supra*, at 1; see also *id.* at 3-4) that "[t]he assessment as to who is a refugee, i.e. the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee finds himself at the time he applies for recognition of refugee status." It thus offered the *Handbook* simply "for the guidance of government officials concerned with the determination of refugee status in the

that all or virtually all of the members of a group to which he belonged had been persecuted, or evidence of activities in which he had engaged since leaving his homeland that indicated a likelihood of persecution if he returned, would not be granted withholding of deportation relief. See Appendix, *infra*, 1a-4a, for a representative sample of post-accession cases in which withholding of deportation was denied.

³³ Additional hearings on the Act were held on September 19 and 25, 1979, and the House Judiciary Committee's report was dated November 9, 1979. Nevertheless, we have found no mention of the *Handbook* anywhere in the legislative history.

various Contracting States" (*Handbook, supra*, at 2; see also *id.* at 4, 53).

In any event, the *Handbook's* interpretation of the phrase "well-founded fear" as used in the Protocol does not support the court of appeals' conclusion that Congress's inclusion of the same language in the Refugee Act altered the standard by which an alien is required to prove eligibility for withholding of deportation. The UNHCR recognized (*Handbook, supra*, at 47 ¶ 196) the "general legal principle that the burden of proof lies on the person submitting a claim." Moreover, the UNHCR, like the Board in *In re Dunar, supra*, focused (*Handbook, supra*, at 11-12) on the requirement that the subjective condition—the element of fear—be "well-founded." This implied to the UNHCR, as it had to the Board (*In re Dunar, supra*, 14 I. & N. Dec. at 319-320),

that it is not only the frame of the mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation.

Handbook, supra, at 11-12. Hence, like the pre-Protocol standard described above (pages 22-25), the term "well-founded fear" also "contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration." *Handbook, supra*, at 12, ¶ 38.³⁴

³⁴ The United Nations Economic and Social Council's *Report of the Ad Hoc Committee on Statelessness and Related Problems* 39 (Feb. 17, 1950) (E/1618; E/AC 32/5) (reprinted in 11 U.N. ESCOR, Annex (Agenda Item 32) at 11, U.N. Doc. E/1618 and Corr. 1 (1950)) supports the view that the "well-founded fear of persecution" standard, like the previous formulations, includes objective as well as subjective elements. That report defines the expression "'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion'" as meaning "that a person has either been actually a victim of persecution or can show good reason why he fears persecution." *Ibid.*

Indeed, many of the factors that the UNHCR mentioned (*Handbook, supra*, at 12, ¶¶ 40-41) as bearing on even the *subjective* element are precisely those on which the INS, the Board, and the courts always have focused in evaluating an alien's application for withholding of deportation, *i.e.*, the strength of his political or religious convictions, "the personal and family background of the applicant, his membership in a particular racial, religious, national, social or political group * * * and his personal experiences." The UNHCR counseled further (*Handbook, supra*, at 13, ¶ 43) that an assessment of whether an alien's fear is justified and reasonable also must take into account:

What, for example, happened to his friends and relatives and other members of the same racial or social group * * *. The laws of the country of origin, and particularly the manner in which they are applied will be relevant. * * * In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, *e.g.*, a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well-founded."

Furthermore, as has always been the case, "[t]he situation of each person must * * * be assessed on its own merits." *Ibid.* The UNHCR thus recognized (*id.* at 13, ¶ 45; emphasis added) that an applicant for refugee status under the Protocol must continue to show "good reason why *he individually* fears persecution." Therefore, even if the *Handbook's* interpretation of the phrase "well-founded fear" as used in the Protocol were dispositive, it is sufficiently equivalent to the criteria that the courts and immigration authorities traditionally have employed in evaluating withholding and asylum claims (see pages 22-25, *supra*) to dispel the notion that the inclusion of the "well-founded fear" language in the Refugee Act was intended to alter that preexisting standard.

D. Congress, In Enacting The Refugee Act Of 1980, Did Not Intend To Alter The Standard For Proving Eligibility For Withholding Of Deportation

1. As we have shown (pages 15-18, *supra*), the focus of the Refugee Act of 1980 was on the regularization of the *admission* of refugees to this country and on their successful resettlement and absorption once here. S. Rep. No. 96-256, *supra*, at 2-3, 5 (1979) (emphasis added) ("[t]he central feature of S. 643 is the establishment of statutory provisions for the *admission* of refugees).³⁵ To those ends, Congress adopted the unified admissions policy described above (pages 16-18, *supra*), whereby virtually all refugees admitted to the United States enter pursuant to 8 U.S.C. (Supp. V) 1157 under numerical limitations set by the President in consultation with Congress, with parole no longer employed for refugees except when the Attorney General determines, in a particular case, that it is required for "compelling reasons in the public interest" (8 U.S.C. (Supp. V) 1182 (d) (5) (B)).

By contrast, Congress evinced no intent to alter the law concerning aliens already within this country or at its borders who desired to avoid deportation or return to

³⁵ See also *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (1979); *The Refugee Act of 1979, S. 643: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 2, 8, 39 (1979); 125 Cong. Rec. 23232 (1979) (remarks of Sen. Kennedy).

Title I of the Refugee Act of 1980, Pub. L. No. 96-212, Section 101, 94 Stat. 102, contains a Congressional Declaration of Policies and Objectives. Subsection (b) provides (8 U.S.C. (Supp. V) 1521 note):

The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.

a country in which they feared persecution. See generally *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6 (1981). Rather, by both amending Section 243(h) and, for the first time, including in the Act a provision for asylum, Congress expressly intended simply to conform United States domestic law to reflect its international obligations under the United Nations Protocol. The House Report, which states this intent clearly, is worth quoting at length (H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 17-18 (1979); emphasis added):

Asylum and Withholding of Deportation

Since 1968, the United States has been a party to the United Nations Refugee Protocol which incorporates the substance of the 1951 U.N. Convention of Refugees and which seeks to insure fair and humane treatment for refugees within the territory of the contracting states.

Article 33 of the Convention, with certain exceptions, prohibits contracting states from expelling or returning a refugee to a territory where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. *The Committee Amendment conforms United States statutory law to our obligations under Article 33 in two of its provisions:*

(1) *Asylum*.—The Committee Amendment establishes for the first time a provision in Federal law specifically relating to asylum. . . .

Currently, United States asylum procedures are governed by regulations promulgated by the Attorney General under the authority of section 103 of the Immigration and Nationality Act (see 8 CFR 108), which grants the Attorney General authority to administer and enforce laws relating to immigration. No specific statutory basis for United States asylum relief currently exists. The asylum provision of this legislation would provide such a basis.

The Committee wishes to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and feels it is both necessary and desirable that United States domestic law include the asylum provision in the instant legislation. * * *

(2) *Withholding of Deportation*.—Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. The legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. * * *

As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements.

See also 126 Cong. Rec. H1521 (daily ed. Mar. 4, 1980) (remarks of Rep. Holtzman); 125 Cong. Rec. H11967 (daily ed. Dec. 13, 1979) (remarks of Rep. Holtzman).

The Senate Report also states unequivocally that passage of the Refugee Act was intended to work no change in the standard by which an alien must prove eligibility for asylum relief (S. Rep. No. 96-256, 96th Cong., 1st Sess. 9 (1979) (emphasis added)):

As amended by the Committee, the bill establishes an asylum provision in the Immigration and Na-

tionality Act for the first time by improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States. *The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in November 1969 [sic].*

See also *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of David Martin, Office of the Legal Adviser, Department of State) ("For purposes of asylum, the provisions in this bill do not really change the standards").

This congressional design is confirmed by the conference reports, which explain that Section 243(h), as amended, was "based directly upon the language of the Protocol and [was] intended [to] be construed consistent with the Protocol." S. Rep. No. 96-590, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 96-781, 96th Cong., 2d Sess. 20 (1980). See also 126 Cong. Rec. 3757-3758 (1980) (remarks of Sen. Kennedy).

By the same token, both the House and Senate reports make clear that the new definition of "refugee" contained in 8 U.S.C. (Supp. V) 1101(a)(42)(A) was intended simply to conform to the definition in the Protocol. H.R. Rep. No. 96-608, *supra*, at 9; S. Rep. No. 96-256, *supra*, at 4, 14-15.³⁶ Nowhere in the legislative history of the

³⁶ See also, e.g., *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of Doris Meisaner, Deputy Associate Attorney General, Department of Justice) ("[w]hat we have done in the Administration bill is simply incorporated the United Nations definitions for 'refugee'"); *Refugee Act of 1979: Hearings on H.R. 3816 Before the Subcomm. on Immigration, Refugees, and International Law of the House*

Refugee Act is there any suggestion that the use of the phrase "well-founded fear of persecution" was intended to alter the standard by which an alien was required to prove eligibility for withholding of deportation or asylum. Rather, the legislative history indicates that the only change Congress contemplated would result from incorporation of the United Nations' definition was the elimination of the discrimination inherent in the ideological and geographical restrictions on conditional entry under former Section 203(a) (7), 8 U.S.C. 1153(a) (7).³⁷

2. As we explained at the outset (page 22, *supra*), our discussion of pre-Refugee Act law is designed to elucidate, first, Congress's express intent, in enacting the relevant portions of the 1980 Act, to incorporate the provisions of the United Nations Protocol, and, second, Congress's use, in the 1980 legislation, of the Protocol's "well-founded fear" terminology. Hence, the fact that the Senate, in giving its advice and consent to accession

Comm. on the Judiciary, 96th Cong., 1st Sess. 43 (1979) (remarks of Dick Clark, Ambassador at Large and U.S. Coordinator for Refugee Affairs) (the bill "essentially adopts the definition of the United Nations Protocol Relating to the Status of Refugees").

³⁷ See, e.g., *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House* (remarks of Doris Meissner, Deputy Associate Attorney General, Department of Justice) (new definition "supplants the definition in the immigration statute right now which limits 'refugees' to certain geographical areas of the world"); *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 27 (1979) (remarks of Rep. Fish) ("the fundamental change under the legislation, of course, is the replacing of the existing definition of refugee with the definition which appears in the United Nations Convention and Protocol on refugees, thus eliminating ideological and geographical limitations * * *"); S. Rep. No. 96-256, 96th Cong., 1st Sess. 15 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 1, 9 (1979); 126 Cong. Rec. H1520 (daily ed. Mar. 4, 1980) (remarks of Rep. Holtzman) ("[t]his new definition finally eliminates the geographical and ideological restrictions applicable to refugees contained in our law since 1952").*

to the Protocol in 1968, did not intend to alter the then prevailing standard by which an alien was required to prove eligibility for withholding of deportation makes clear that Congress, in incorporating the provisions of the Protocol in the Refugee Act, also did not intend to alter the pre-1968 standard.³⁸ In addition, the fact that

³⁸ More recent legislative history confirms that subsequent Congresses have been well aware of the basis on which this country acceded to the United Nations Protocol in 1968. In connection with its recent consideration of the proposed Immigration Reform and Control Act of 1982, the House reiterated the legislative understanding that the 1968 accession to the Protocol did not expand the substantive rights of aliens (H.R. Rep. No. 97-890 (Pt. 1), 97th Cong., 2d Sess. 51 (1983) (emphasis added)):

By accession to the Protocol the United States agreed not to deport a refugee "to frontiers or [sic] territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion." *Some question has arisen as to whether the United States, by agreeing to the Protocol, intended to expand or modify the rights of aliens seeking asylum in the United States.* The Committee is convinced that nothing in present law, nor in [the proposed legislation], should be construed as providing less protection than the Protocol. That is, *the Committee views the Protocol as creating no substantive or procedural rights not already existing either under current [immigration] law or under the law as modified by the Committee Amendment. The Committee thus agrees with the holding in Pierre v. United States [supra,] wherein it is stated that "accession to the Protocol by the United States was neither intended to nor had the effect of substantially altering the statutory immigration scheme."*

See also *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 107 (1981) (remarks of Ira Kurzban, Counsel for the National Civil Liberties Committee and the Haitian Refugee Center, Inc.) ("[t]he present system requires that an alien show a 'clear probability' that he is a bona fide asylum applicant"). Such subsequent legislative history "does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." *Bell v. New Jersey*, No. 81-2125 (May 31, 1983), slip op. 10.

the words "well-founded fear," as used in the United Nations Protocol, had been consistently construed as equivalent to the pre-1968 standard (whether that standard is denominated as "realistic likelihood" or "clear probability") further refutes any suggestion that Congress's use of those words in the 1980 Act was intended to denote a change from the previous standard.

Our inquiry thus ordinarily would be at an end. Nevertheless, in order to dispel any doubt, we address two additional points raised by the court below.

a. The Second Circuit viewed (Pet. App. 13a) the legal standard by which an alien was required to prove persecution or fear of persecution under former Section 203(a)(7) as "considerably less stringent than Section 243(h)'s 'clear probability' of persecution of a singled-out individual * * *." Accordingly, the court opined (Pet. App. 22a-23a) that "[s]ince the 1980 Act dictates that a uniform test of 'refugee' be applied to all aliens," and since "the general purpose of the Act is to regularize, not hinder," the entry "of refugees, * * * it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than had existed in prior law." The court of appeals' analysis is flawed in several respects.

In the first place, the cases on which the court of appeals relied do not support its assertion that the burden of proving "persecution or fear of persecution" under former Section 203(a)(7) was less stringent than the burden of proving a "clear probability of persecution" under Section 243(h). The thrust of *In re Tan*, 12 I. & N. Dec. 564 (1967), the only Board decision cited by the court, was the discretionary nature of the determination required of the Attorney General under Section 243(h) concerning whether the alien would be subject to persecution in the country to which he sought withholding of deportation (see 12 I. & N. Dec. at 566, 568-569). It was the existence of this element of discretion that led the Board to reject the claim (*id.* at 569-570) "that an

alien deportee is required to do no more than meet the standards applied under Section 203(a) (7) of the Act when seeking relief under section 243(h)." Similarly, while *In re Ugricic*, 14 I. & N. Dec. 384 (Dist. Dir. 1972), referred to the applicable standard under Section 203(a) (7) as persecution or "good reason to fear persecution" (14 I. & N. Dec. at 385-386), it gave no indication that that standard, as applied, was any less stringent than "clear probability" or any of the other formulations by which Section 243(h) claims had been evaluated. Indeed, as we noted above (note 34), the "good reason to fear" formulation incorporates the objective criteria that are the hallmark of the "clear probability" test.³⁹

Moreover, even if the burden of proving "persecution or fear of persecution" under former Section 203(a) (7) was less demanding than that of proving a "clear probability of persecution" under Section 243(h), the court of appeals' conclusion that our construction of the Refugee Act imposes a more stringent test for entry than had existed under prior law is flawed because it fails to take account of the additional elements of proof required of an alien seeking conditional entry under former Section 203(a) (7). The courts in construing former Section 203(a) (7) recognized that an applicant for conditional entry was required to prove *both* that he had fled a Communist, Communist-dominated or Middle Eastern

³⁹ The court of appeals also relied (Pet. App. 13a) on *In re Adamska*, 12 I. & N. Dec. 201 (Reg. Comm. 1967). But that case involved (*id.* at 202) a comparison between "[t]he statutory standards for refugee status under section 203(a) (7)" and the *pre-1965* standard for withholding of deportation under Section 243(h)—that the alien "would be subject to physical persecution" in the country of deportation (see note 10, *supra*). Not surprisingly, in those circumstances the Regional Commissioner held that the denial of the alien's prior application for withholding of deportation was not dispositive of her Section 203(a) (7) application (12 I. & N. Dec. at 202): "The holding in 1960 that the applicant would not be subject to 'physical persecution' in Poland is not determinative of the issues in the present [Section 203(a) (7)] application."

country because of persecution or fear of persecution on account of race, religion, or political opinion, and that he was unable or unwilling to return to such country on account of race, religion, or political opinion. *Shubash v. INS*, 450 F.2d 345, 346 (9th Cir. 1971); *Ishak v. District Director*, 432 F. Supp. 624, 626 (N.D. Ill. 1977). And in assessing the second prong of the applicant's proof—his claim of inability or unwillingness to return to his homeland on account of race, religion, or political opinion—the standard applied was whether the alien had established a "likelihood of persecution" or "probable persecution" in the country of deportation. See *Ishak v. District Director*, *supra*, 432 F. Supp. at 626. Those verbal formulations correspond to the standard that consistently has been applied to evaluate claims for withholding of deportation under Section 243(h).⁴⁰ Hence, even if one discrete element of the proof required of an applicant for conditional entry—"persecution or fear of persecution"—was less stringent than the "clear probability of persecution" standard imposed on those seeking withholding of deportation, the additional elements of proof required of a conditional entrant amounted to essentially the same showing required of an applicant for withholding relief.⁴¹

Finally, even if the court of appeals were correct in concluding that the standard for admission of refugees under new Section 207, 8 U.S.C. (Supp. V) 1157, is

⁴⁰ In fact, in applying these formulations, the *Ishak* court relied solely on cases decided under Section 243(h). See *Ishak v. District Director*, *supra*, 432 F. Supp. at 625, citing *Kashani v. INS*, *supra*; *Cisternas-Estay v. INS*, 531 F.2d 155 (3d Cir. 1976); *Shkukani v. INS*, 435 F.2d 1378 (8th Cir.), cert. denied, 403 U.S. 920 (1971); *Rosa v. INS*, 440 F.2d 100 (5th Cir. 1971); and *Chang Kai Fu v. INS*, *supra*.

⁴¹ Indeed, *In re Taheri*, 14 I. & N. Dec. 27 (Reg. Comm. 1972), on remand, 14 I. & N. Dec. 35 (Reg. Comm. 1973), suggests that an alien who was ineligible for conditional entry because he could not show flight on account of persecution might nonetheless be eligible for withholding of deportation under Section 243(h). See 14 I. & N. Dec. at 30, 38.

somewhat more stringent than the standard for conditional entry under former Section 203(a) (7), the result would not be "anomalous." As noted above (page 12, *supra*), conditional entry relief under former Section 203(a) (7) was available to a narrowly circumscribed class of aliens, numerically as well as geographically and ideologically. As a consequence, the majority of refugees who entered the United States prior to 1980 did so under the Section 212(d) (5) "parole" authority. *Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearing Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 10 (1979); S. Rep. No. 96-256, 96th Cong., 1st Sess. 1-2, 5-6 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 2, 4, 11 (1979). Not only was exercise of the parole authority wholly discretionary with the Attorney General, but also, even when it was exercised, it afforded a much narrower form of relief (see pages 12-13, *supra*). Thus, in focusing on the "more generous" standard for conditional entry under Section 203(a) (7), the Second Circuit ignored the fact that that provision was available to only a limited number of refugees fleeing specified categories of countries (see generally *U.S. Refugee Programs: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 17 (1980)), while the majority of refugees were subject to the vagaries of the parole system.

It was Congress's intent in the Refugee Act, however, to equalize the United States' policy toward refugees regardless of their homeland.⁴² Indeed, one of

⁴² See, e.g., *Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearing Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 21 (1979) (remarks of Dick Clark, U.S. Coordinator for Refugee Affairs and Ambassador-at-Large) (passage of the Refugee Act "would make all people — regardless of their ideology, regardless of their geography — eligible for the [refugee] program"); S. Rep. No. 96-256, 96th Cong., 1st Sess. 1 (1979); H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 13 (1979); 125 Cong. Rec. 23240 (1979) (remarks of Sen. Boschwitz)

Congress's chief objectives in enacting the 1980 legislation was to repeal former Section 203(a)(7), particularly because of its discriminatory criteria. Congress filled the vacuum created by the elimination of that provision by incorporating in the Refugee Act the uniform definition of refugee contained in the United Nations Protocol (see legislative history cited in notes 36 & 37, *supra*).

In short, it is common ground that a significant impetus for the Refugee Act of 1980 was "Congress's sympathy to the plight of refugees * * *" (Pet. App. 22a).⁴³ But the court of appeals erred in construing Congress's concern as relating to the standard each individual alien must meet in order to establish eligibility for admission. To the contrary, Congress's intent in enacting the Refugee Act, and particularly in repealing Section 203(a)(7) and replacing it with a uniform definition of refugee, was to broaden the "pool" of aliens for whom refugee status would be even a possibility. If, by doing so, the burden of proof required of aliens previously eligible for conditional entry under Section 203(a)(7) was heightened by virtue of the elimination of a previous presumption in their favor, that was no "anomal[y.]" Rather, it was an inevitable byproduct of Congress's desire to offer refuge from persecution equally and nondiscriminatorily, within the constraints imposed by our inability to accommodate all of the world's oppressed.

b. The court of appeals also concluded (Pet. App. 16a) that a new burden of proof was required in withholding

("[i]f our commitment to help desperate, homeless people is sincere, we must be willing to help all in need of assistance despite their ideologies or countries of origin").

⁴³ The court of appeals' particular emphasis (Pet. App. 19a, 22a) on the plight of the "boat people," however, is misplaced. As Senator Kennedy, the primary sponsor of the Refugee Act, explained (125 Cong. Rec. 23234 (1979)): while the "current crisis of refugees in Indochina * * * underscored the need for the permanent structure and framework this legislation will bring to our refugee resettlement programs," the "reform legislation has been pending in various forms in Congress for some years."

cases because "standards developed in an era of discretionary authority require some adjustment." There is no merit to this peculiar suggestion.

To begin with, as we have shown above, the statutory language warrants no such change and the legislative history expressly precludes it. In addition, notwithstanding the discretionary cast of former Section 243(h), no alien found statutorily eligible for withholding of deportation under that provision was ever denied relief as a matter of administrative discretion. See *In re Dunar*, *supra*, 14 I. & N. Dec. at 321-323. The Board thus never considered that it possessed unfettered discretion under Section 243(h). Accordingly, the court of appeals' attack (Pet. App. 16a) on the "'clear probability'" test as having "been initially articulated by the BIA as its preferred way of implementing what had been [its] wholly discretionary authority" is simply unfounded. See *Kashani v. INS*, *supra*, 547 F.2d at 379.⁴⁴

E. The BIA's Construction Of The Refugee Act Of 1980 As Not Having Altered The Standard By Which An Alien Must Prove Eligibility For Withholding Of Deportation Is Entitled To Substantial Deference

"Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference * * *." *United States v. Clark*, 454 U.S. 555, 565 (1982). See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Udall v. Tallman*, 380 U.S. 16 (1965). Accordingly, the Board's view of the standard by which an alien must prove eligibility for relief under 8 U.S.C. (Supp. V) 1253(h), as expressed in cases it decided subsequent to enactment of the Refugee Act, is entitled to substantial weight.⁴⁵

⁴⁴ What is more, as noted above (page 25, *supra*), it was not the Board but the courts that initially articulated the "clear probability" test.

⁴⁵ With certain exceptions not relevant here, the Attorney General is charged with the administration and enforcement of the Immigration and Nationality Act, 8 U.S.C. 1103(a). He, in turn,

Cognizant of Congress's intent in the Refugee Act not to alter the standard by which an alien must establish eligibility for relief under Section 243(h) (see pages 36-40, *supra*), the Board, since enactment of that legislation, has continued to use the phrases "clear probability of persecution" and "likelihood of persecution" as well as "well-founded fear of persecution" to describe that standard. See, e.g., *In re Exilus*, Interim Dec. No. 2914 (BIA Aug. 3, 1982), slip op. 3-4 ("well-founded fear of persecution" and "likelihood of persecution"); Pet. App. 31a ("clear probability of persecution to be directed at the individual respondent"); *Rejaie v. INS*, *supra*, 691 F.2d at 140 (Pet. App. 38a), quoting the Board ("clear probability of persecution"); *In re Martinez-Romero*, Interim Dec. No. 2872 (BIA June 30, 1981), slip op. 6-7 ("clear probability" and "well-founded fear"), *aff'd*, *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982); *In re Lam*, Interim Dec. No. 2857 (BIA Mar. 24, 1981), slip op. 3-4 ("clear probability" used by immigration judge; "well-founded fear" used by the Board); *In re McMullen*, 17 I. & N. Dec. 542, 544-546 (BIA 1980) ("clear probability" and "likelihood of * * * persecution"), *rev'd* on other grounds, *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981). Moreover, regardless of how they are labeled, the Board has made clear that the criteria by which it evaluates withholding or asylum claims have not changed since passage of the Refugee Act. (*In re Martinez-Romero*, *supra*, slip op. 6-7):

[G]eneralized undocumented assertions regarding claims of persecution ordinarily will not be sufficient to support a motion to reopen [to apply for withholding relief]. See generally *Matter of Chum-pitazi*, 16 I&N Dec. 629 (BIA 1978). Similarly,

has delegated to the Board appellate authority over decisions of special inquiry officers in deportation, including withholding of deportation, cases (see 8 C.F.R. 3.1(b)(2), 242.17(c)). The Board's decisions are final unless referred to the Attorney General (8 C.F.R. 3.1(d)(2) and (h)).

general allegations of political upheaval which affect the populace as a whole are insufficient to warrant reopening. See generally *Fleurinor v. INS*, 585 F.2d 129 (5 Cir. 1978); *Matter of Diaz*, 10 I&N Dec. 199 (BIA 1963); see also *Matter of McMullen*, *supra*. Evidence presented in support of a claim of persecution must demonstrate a clear probability of persecution directed at the individual [alien] or a class to which the individual [alien] belongs. *Cheng Kai Fu v. INS*, *supra*; *Matter of Chumpitazi*, *supra*. Evidence such as newspaper articles will be considered in evaluating a claim of persecution. However, this type of evidence normally is not significantly probative on the issue of whether a particular alien would be subject to persecution if deported. See *Matter of McMullen*, *supra*.

See also *Rejaie v. INS*, *supra*, 691 F.2d at 145 (Pet. App. 50a).

At least as applied, therefore, the terms "well-founded fear" and "clear probability" have always been equivalent. The Second Circuit's holding that the "well-founded fear" language in the Refugee Act of 1980 requires withholding of deportation under Section 243(h) upon a showing "far short of a 'clear probability' that an individual will be singled out for persecution" (Pet. App. 23a) thus liberalizes significantly the standard by which aliens' claims must now be assessed. In so doing, the court of appeals worked a fundamental change in the substance of our withholding and asylum law, in direct contravention of the intent underlying both the United States' accession to the Protocol in 1968 and the enactment of the Refugee Act of 1980. Such a flagrant violation of express legislative intent should not be permitted to stand.⁴⁶

⁴⁶ The court of appeals acted particularly irresponsibly in striking down the standard that the Board and the INS have consistently employed without providing any guidance concerning what it would consider to be an appropriate alternative (see pages 6-7 & note 8, *supra*). The court's bare suggestions (Pet. App. 15a, 23a)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court for disposition of respondent's petition for review under the standard that has been consistently applied by the Board.

Respectfully submitted.

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that the proper standard "is somewhat more generous than the BIA's administrative practice" and is satisfied by "a showing far short of a 'clear probability'" are singularly unenlightening to immigration authorities charged with the task of ruling on withholding and asylum applications. Hence, even if the INS and the Board were to evaluate all post-Refugee Act claims in view of the decision below, there is no assurance that such an attempt would satisfy the Second Circuit or would not result in further remands to the Board until that body happened upon the particular standard contemplated by the court of appeals. In addition to thwarting the will of Congress, therefore, affirmance of the decision below would impose substantial burdens in the administration of our immigration laws.

APPENDIX

Representative sample of cases decided subsequent to accession to the Protocol but prior to passage of the Refugee Act of 1980 in which withholding of deportation relief was denied:

1. *Fleurinor v. INS*, 585 F.2d 129, 134 (5th Cir. 1978)—withholding of deportation to Haiti not warranted by evidence that, in 1970, the alien was arrested by the semi-official secret police because of their belief that he had taken part in an invasion of Haiti launched from the Bahamas, where the alien had not taken part in any such invasion, where Haiti subsequently issued the alien a passport and permitted him to return to the Bahamas, where none of the alien's family who resided in Haiti had been arrested or harmed by the government, and where there was no evidence "that the Haitian government has any interest in [the alien] today, eight years after the supposed arrest."

2. *Henry v. INS*, 552 F.2d 130, 131-132 (5th Cir. 1977)—in the absence of any evidence of political activism on the part of either the aliens or any members of their families, the aliens' conclusory allegation that the Haitian government receives with hostility citizens returning from abroad does not warrant withholding of deportation.

3. *Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977)—essentially undocumented statements of alien's belief that he would be threatened by communists if he were deported to Portugal, which the immigration judge disbelieved, did not warrant withholding of deportation.

4. *Kashani v. INS*, 547 F.2d 376, 380 (7th Cir. 1977)—alien's motion to reopen deportation proceedings in order to apply for relief under Section 243(h) and the United Nations Protocol was properly denied in the absence of any objective evidence that he had participated in

demonstrations against the Shah or had written letters and articles voicing opposition to the Iranian government.

5. *Zamora v. INS*, 534 F.2d 1055, 1063 (2d Cir. 1976)—evidence that Philippine aliens had participated in 1969 or 1970 in anti-government demonstrations for which *other* participants had been arrested and that their cousin was married to the nephew of an imprisoned Philippine senator did not warrant withholding of deportation where the aliens themselves had never been arrested and subsequently had been permitted to leave the Philippines and where the cousin and nephew had never been persecuted.

6. *Khalil v. INS*, 457 F.2d 1276, 1278 (9th Cir. 1972)—withholding of deportation not warranted by the alien's fears that she would be persecuted if returned to Egypt, in the absence of any "factual support which might have demonstrated the reasonableness" of her belief.

7. *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971)—alien's assertion that, if returned to the Dominican Republic, he would be persecuted on account of his employment 10 years earlier as a police sergeant under the Trujillo regime, supported only by a conclusory affidavit based largely on hearsay, did not establish a clear probability that the alien would be subject to persecution if deported.

8. *Shkukani v. INS*, 435 F.2d 1378 (8th Cir.), cert. denied, 403 U.S. 920 (1971)—Jordanian citizen's subjective fear that, because his family and friends lived in Israeli-occupied territory and because he had not supported any Arab guerilla movement, he might be considered an enemy, supported by a conclusory affidavit by an American professor and a *New York Times Magazine* article describing the general conditions in occupied Jordan, did not establish the probability that the alien would be persecuted if returned to Jordan.

9. *Gena v. INS*, 424 F.2d 227, 233 (5th Cir. 1970)—alien's conclusory assertion that he would be subject to persecution if deported to Haiti because his political

views were opposed to those of the Duvalier regime insufficient ground for reopening deportation proceedings.

10. *In re Williams*, 16 I. & N. Dec. 697, 700 (BIA 1979)—withholding of deportation to Haiti not warranted by alien's claim that, in 1968, her uncle was arrested by the Ton Ton Macoute, jailed and mistreated, as a result of which he subsequently died, where there was "[a]bsent from [the] proof * * * any basis for believing that the Haitian Government had any interest in her status."

11. *In re Chumpitazi*, 16 I. & N. Dec. 629, 634 (BIA 1978)—generalized, undocumented assertions of a dictatorship in Peru combined with newspaper articles describing political conditions there during a recent strike did not warrant withholding of deportation.

12. *In re Francois*, 15 I. & N. Dec. 534, 539 (BIA 1975)—evidence that, in 1960, the alien's father, a supporter of the government that preceded the Duvalier regime, was murdered on account of his political opinion, that, in 1968, alien's stepfather, a Haitian refugee, was murdered upon his return to Haiti and that other family members have been murdered in Haiti did not establish a "well-founded fear" of persecution where the alien had no contact with Haiti since he left that country shortly after his father's death, where he had not been politically active, and where he "has not demonstrated any reason why the government of Haiti might be interested in him at this time."

13. *In re Mladineo*, 14 I. & N. Dec. 591, 592 (BIA 1974)—alien's "conclusory declaration that she had suffered economic and employment privation in Chile because of her refusal to become a Socialist or a Communist" did not make out a prima facie showing that her fear of persecution in Chile was well-founded, especially since the prevailing regime was anti-Socialist and anti-Communist.

14. *In re Bohmwald*, 14 I. & N. Dec. 408, 409 (BIA 1973)—conclusory allegations that alien would be perse-

cuted in Chile because of his opposition to the Communist form of government and because he could not practice Catholicism there did not constitute a "*prima facie* showing that [the alien] has a well-founded fear of persecution in Chile."

15. *In re Surzycki*, 13 I. & N. Dec. 261, 262 (BIA 1969)—withholding of deportation to Poland not available to an alien whose sole claim of "persecution" was that, because of an "anti-intellectual climate" in that country, he would be punished if he expressed himself freely; such an alien "is in no different position than any other Polish person in Poland, and there is nothing * * * to show he would in any way be singled out for persecution as claimed."

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-973

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

BRIEF FOR THE RESPONDENT

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(1)

QUESTION PRESENTED

Whether the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 et seq., changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation.

(II)

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THE REFUGEE ACT OF 1980 CHANGED THE STANDARD AN ALIEN MUST MEET IN ORDER TO AVOID DEPORTATION ON THE GROUND THAT HE WOULD BE SUBJECT TO PERSECUTION IN THE COUNTRY OF DEPORTATION.

A. After Acceding To The United Nations Protocol Relating To The Status of Refugees in 1968, The United States Failed To Adopt The Protocol Definition Of Refugee By Either Legislative Act Or Administrative Regulation. To Explain This Seeming Failure To Honor Our Treaty Obligations The Board And The Courts Resorted To The Sophist Reasoning That Since The Protocol Was A Self-Executing Treaty, No Legislation Was Necessary, Consequently Compelling Them To State That Since The "Well Founded Fear" Standard Was Therefore The Law Of The Land, It Was Perforce Equivalent To The Pre-Protocol Standard Of "Clear Probability Of Persecution", Which Had Not Changed.

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B.Until The Refugee Act Of 1980, The United States Lacked A Commitment To A Formal Refugee Policy And Individual Laws Were Passed In Response To Emergent World Crises. With The Passage Of The Refugee Act Of 1980, Formal Standards For Determining Refugee Status Were Promulgated For The First Time, Which Standards Were To Be Used For Determining Eligibility For Withholding Of Deportation For Feared Political Persecution. 30

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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

No. 82-973

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner

v.

PREGRAG STEVIC,

Respondent

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

(2)

STATUTE INVOLVED

8 U.S.C. (Supp.V) 1253 (h) (1) provides
in pertinent part:

"The Attorney General shall not deport or return any alien *** to a country if the Attorney General determines that such an alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

STATEMENT

Predrag Stevic was born on June 11, 1950, in Gnjilane, Kosovo, Yugoslavia, a section of Yugoslavia that is 92% occupied by ethnic Albanians who are trying by terroristic tactics to evict the remaining Yugoslavs so that this province may secede from Yugoslavia and become part of Albania. The Yugoslav Government has been unable to control the Albanian violence.

Mr Stevic, a university philosophy graduate, entered the United States on June

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8, 1976 to visit his sister in Chicago, Vidosava Stevic Lazarevic, now a United States Citizen. He overstayed his visit and was placed under deportation proceedings in November, 1976. On December 16, 1976, Mr Stevic appeared at a deportation hearing before an immigration judge. He did not contest his deportability, nor did he apply for political asylum or withholding of deportation, but instead he agreed to two months' "voluntary departure".

On January 16, 1977, Mr. Stevic married Mirjana Doychin, a United States citizen, who filed an immediate relative petition for him. At that time, Mirjana's father, Pavela Doychin, also a U.S. citizen, was in prison in Yugoslavia because of his anti-communist activities. Believing his U.S. citizenship would protect him, Mr Doychin, who was active in the Serbian anti-communist movement in

(4)

Chicago, had returned to Yugoslavia for a visit in 1974. He remained in prison there for three years and upon his return to the United States, committed suicide.

On January 28, 1977, Mr Stevic applied for membership in the League of Serbian Volunteers. On February 5, 1977, he was inducted, vowing to fight against communism until the entire Serbian population was liberated.(R. 165-169.)*

On April 10, 1977, Mrs Stevic was killed in an automobile accident.

The immediate relative petition was revoked by the Immigration and Naturalization Service on June 13, 1977 and a request to reinstate the petition for humanitarian reasons under newly enacted 8 CFR 205.1

(*) "R" refers to the certified administrative record in the Court of Appeals.

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(a)(3) was summarily denied.(1)

On August 24, 1977, Mr Stevic's Chicago attorney made a Motion to reopen deportation proceedings to allow Mr Stevic to apply for withholding of deportation under Section 243 (h) of the Immigration and Nationality Act.(2)

Section 243 (h) at that time, read:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race,

(1) §205.1 Automatic revocation

The approval of a petition ...is revoked as of the date of approval...if any of the following circumstances occur...

(a)(3) Upon the death of the petitioner unless the Attorney General in his discretion determines that for humanitarian reasons revocation would be inappropriate.

(2) The Immigration and Nationality Act of October 3, 1965 (79 Stat. 918) substituted "persecution on account of race, religion or political opinion" for "physical persecution".

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religion, or political opinion and for such period of time as he deems necessary for such reason."

Since his marriage to Mira and because of his father-in-law's imprisonment in Yugoslavia, Mr Stevic had become active in the "overseas" anti-communist movement.

In June, 1979, Mr Stevic also independently applied for political asylum to the District Director in Chicago, which application was denied on July 31, 1979. (R.164.)

On October 17, 1979, the first Motion to reopen was denied by an Immigration judge, whose decision stated:

"The policy of restricting favorable exercise of discretion to cases of clear probability of persecution of the particular individual has been sanctioned by the courts (Lena v. Immigration and Naturalization Service. 379 F 2nd

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536 538 (7th Cir. 1967). The respondent has submitted no substantial evidence that he would be subjected to persecution as that term is defined by the court. (R.151).

An Appeal to the Board of Immigration Appeals was filed on October 26, 1979.

On January 18, 1980, the Board of Immigration Appeals, in dismissing the Appeal for lack of prima facie eligibility and denying the Motion to reopen, stated:

"A Motion to reopen based on a Section 243 (h) claim of persecution must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. See Cheng Kai Fu v. INS, 386 F. 2d 750 (2 Cir. 1967) cert denied 390 U.S. 1003 (1968).

Although the applicant here claims to be eligible for withholding of deportation which was not available to him at the time of his deportation hearing, he has not presented any evidence which would indicate that he will be singled out for persecution." (R.145)

Mr Stevic's membership in the Ravna Gora, his father-in-law's imprisonment in

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Yugoslavia, proof of imprisonment of others who expressed anti-communist opinions outside of Yugoslavia, were discounted as not "objective evidence" under the "clear probability of persecution" test.

On March 17, 1980, the Refugee Act of 1980, Public Law 96-212, 94 Stat. 102 et seq. was signed into law.

On July 17, 1981, Mr Stevic, who had been ordered to surrender for deportation in February 1981, was arrested in Chicago for deportation.

While changing planes in New York, he broke away from his guards and after an altercation at Kennedy Airport, was placed in an immigration detention center in New York City.

A Writ of Habeas Corpus brought in the U.S. District Court, Southern District of New York on July 21, 1981, addressed solely to the abuse of discretion by the INS in the

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denial of humanitarian relief when Mr Stevic's wife was killed, was dismissed.

Simultaneously, a new Motion was made to the Board of Immigration Appeals for reopening of deportation proceedings to allow Mr Stevic to apply for withholding of deportation under Section 243 (h) of the Immigration and Nationality Act. Voluminous, evidentiary materials were presented to establish Mr Stevic's prima facie eligibility for withholding of deportation under section 243 (h) of the Immigration and Nationality Act and his eligibility for reopening under 8 C.F.R. 3.2, which states:

"Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien

an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing."

The Motion was denied on September 3, 1981. The denial, in summary, held that Mr Stevic had failed to establish a "clear probability of persecution" to be directed at him if he were to return to Yugoslavia.

The Board stated:

"...We also conclude that the respondent has failed to make out a prima facie showing that he will be singled out for persecution if deported to Yugoslavia. A Motion to reopen, based on a Section 243 (h) claim of persecution, must contain prima facie evidence that there is a clear probability of persecution to be directed at the individual respondent. See Cheng Kai Fu v. INS, 386 F 2d 750 (2 Cir. 1967) cert denied 390 U.S. 1003 (1968); Matter of McMullen, Interim Decision 2831 (BIA 1981)..."

The affidavits and petitions contained in the file, while they conclude that the respondent will be imprisoned if he returns to Yugoslavia, do not contain any supporting facts. They express an opinion but provide no direct evidence to link the respondents activities in this country and the probability of his persecution in Yugoslavia.(R.3.)

Although Mr Stevic had submitted affidavits from prominent members of the anti-communist Yugoslavian community expressing the opinion that he would be imprisoned if he returned to Yugoslavia because of Yugoslavia's "hostile propaganda"(3)

(3) Article 133 of the Yugoslavian Federal Criminal Code states:

"1) Whoever, by means of an article, leaflet, drawing, speech or some other way, advocates or incites the overthrow of the rule of the working class and the working people...shall be punished by imprisonment for from one to ten years.

2) Whoever commits an offense as mentioned in paragraph (1) of this article with aid or under influence from abroad, shall be punished by imprisonment for at least one year."

laws, proof of his membership in the leading anti-communist Yugoslavian organizations in Chicago, reports from Amnesty International not previously available regarding Yugoslavia's "hostile propaganda laws" under which a person may be imprisoned in Yugoslavia for an expression of anti-communist opinions outside of Yugoslavia, and newspaper and magazine articles concerning Albanian terrorist activities in Kosovo, which the Yugoslavian government was unable to control, the Board of Immigration Appeals felt he had provided no "direct evidence" to link his activities in this country to the probability of his persecution in Yugoslavia. Yet, Mr Stevic's father-in-law had been imprisoned under the "hostile propaganda" laws.

Mr Stevic had clearly established a "well founded fear of persecution," the

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standard under the U.N. Convention and Protocol, which we had incorporated in the Refugee Act of 1980. He might not have established a "clear probability of persecution" as he could not produce a bullet with his name on it, or a Yugoslavian police look-out list. But neither can most legitimate refugees.

In a consolidated proceeding, the District Court's denial was appealed and review was sought for the BIA denial of the Motion to reopen deportation proceedings in the Second Circuit Court of Appeals. Argument, on January 18, 1982, centered primarily upon whether the Refugee act of 1980 had changed the legal standard for aliens seeking political asylum and to avoid deportation under Section 243 (h) of the Immigration and Nationality Act.

Although the Court of Appeals upheld the

District Court's denial of the Petition for Habeas Corpus, it reversed the BIA denial of the Motion to Reopen, holding that the enactment of the Refugee Act of 1980, Public Law No. 96-212, 94 Stat. 102 et seq. had changed the standards to be used by the INS in adjudicating requests for withholding of deportation under Section 243 (h) of the Immigration and Nationality Act.

The Court held that with the passage of the Refugee Act of 1980, the non-discretionary standard to be applied for withholding of deportation under Section 243 (h) was now "a well-founded fear of persecution", the language not only contained in the Refugee Act, but also the standard of the United Nations Protocol relating to the Status of Refugees, to which the United States had adhered in 1968.

It found that the legal test used by the


BIA in denying Mr Stevic's second Motion, "clear probability", that an individual would be singled out for persecution, was no longer the law.

A new hearing under the legal standard established by the U.N. Protocol and adopted by the United States through the Passage in March 1980 of the Refugee Act of 1980, was ordered.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue before the Court is whether the Refugee Act of 1980 changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to political persecution in the country of deportation.

The Government contends that the standard before 1980 was and is the same as the standard subsequent to the passage of this Law. We contend that it was and is not.



The United States and Swaziland were the only two of the 71 nations who became parties to the United Nation 1967 Protocol Relating to the Status of Refugees by 1979 who had not been parties to the 1951 Convention.(4)

Yet the United States has historically been considered in the forefront of the community of nations in its compassion for refugees. The problem has not been a lack of humanitarian concern for refugees but rather a lack of commitment to a formal refugee policy. We have had, instead, a policy of improvisation based upon reaction to emergent world crises.

While ambiguity may be the language of diplomacy by necessity, the law requires

(4) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. Published by the Office of the United Nations High Commissioner for Refugees, Geneva, Sept. 1979, p. 86.

greater precision. It is for this reason that this case is before this tribunal. The rhetoric of diplomacy has been confused with the language of law in an area in which both are important but have different functions.

The Government contends that the terms "clear probability or persecution" and "well founded fear of persecution" mean and were meant to be the same, and differ only in their spelling. We contend that subsequent to the passage of the Refugee Act of 1980, the standard changed by statute to the latter, and that some attention must finally be paid to the clear meaning of the Statute's wording so that our courts and administrative agencies may finally have some clear guidelines.

The Government contended in its Petition for Certiorari that to find that the standard for determining who is a refugee changed in

1980 would cause thousands of persons whose cases had been decided since 1980 to reopen their cases. This is unrealistic, since many applicants for withholding of deportation would meet neither criteria. It is for those who do not meet the "clear probability criteria, who do not have a bullet reserved in their names, but who do indeed meet the "well founded fear" criteria, that any administrative inconvenience is justified.

Moreover, the Government's strained reasoning that "well founded fear" and "clear probability of persecution" mean the same thing is founded upon the Board's desire, a decade ago, to show that we were observing the U.N. Protocol, although no legislation in its honor had been passed and our administrative agencies were ignoring it.

With the passage of the Refugee Act of 1980 the U.N. standard has become domestic

law and it is time to lay this convoluted reasoning to rest.

ARGUMENT

THE REFUGEE ACT OF 1980 CHANGED THE STANDARD AN ALIEN MUST MEET IN ORDER TO AVOID DEPORTATION ON THE GROUND THAT HE WOULD BE SUBJECT TO PERSECUTION IN THE COUNTRY OF DEPORTATION.

A. After Acceding To The United Nations Protocol Relating To The Status of Refugees in 1968, The United States Failed To Adopt The Protocol Definition Of Refugee By Either Legislative Act Or Administrative Regulation. To Explain This Seeming Failure To Honor Our Treaty Obligations The Board And The Courts Resorted To The Sophist Reasoning That Since The Protocol Was A Self-Executing Treaty, No Legislation Was Necessary, Consequently Compelling Them To State That Since The "Well Founded Fear" Standard Was Therefore The Law Of The Land, It Was Perforce Equivalent To The Pre-Protocol Standard Of "Clear Probability Of Persecution", Which Had Not Changed.

This reasoning was the genesis of the problem today. In fact, the Protocol was not a Self-Executing Treaty, and required enacting legislation. The enacting legislation was passed in 1980. With the passage of the Refugee Act of 1980, the standards for determining who is a refugee

were changed by statute to require a showing of a "Well Founded Fear of Persecution."

In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S.No.6577 which incorporated the definition of refugee of the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, except for geographic modifications.

Under Article 1 of the Protocol, a "refugee" is defined as any person who:

"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country..."

If a person met the definition of "refugee" under the Protocol, he was not to be returned to his country, unless he was a

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threat to national security or a war criminal. (Principle of Non-Refoulement: Article 33, Convention Relating to Refugees).

At the time the Protocol was acceded to by the United States, there was no definition of "refugee" in the Immigration and Nationality Act. In fact there never had been. Withholding of deportation because of persecution was achieved under Section 243 (h) of the Immigration and Nationality Act, 8 U.S.C. 1253 (h) which held:

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Decisions, made in the discretion of the Attorney General invariably held that a motion to reopen based upon a Section 243 (h) claim of persecution must contain prima facie

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evidence that there is a

"clear probability of persecution of the particular individual alien" Lena v. INS 379 F 2d 536 (7 Cir 1967) Cheng Kai Fu v INS 386 F 2d 750 (2 Cir 1967)

With accession to the Protocol in November 1968, there was no change in the standard used by the courts or by the Board of Immigration Appeals. Fleurinor v. INS 585 F 2d 129 (5th Cir. 1978); Kashani v. INS 547 F 2d 376; (7th Cir. 1977) In re Williams 16 I & N Dec. 697 (1979) In re Dunar, 14 I & N Dec. 310 (1973).

The extremely harsh, judicially developed clear probability standard continued to be applied after the accession. Our treaty obligations were ignored.

Under Article VI of the U.S. Constitution, international treaties entered into by the United States are the supreme law of the land. Missouri v. Holland 252 U.S. 416

(1920). Self-executing treaties require no legislative implementation, and supersede any prior inconsistent law. Cook v. United States 288 U.S. 102, 118 (1933). Non self-executing treaties require legislative action.

The Court in United States v. Postal 589 F 2d 862, 876 described the problem of determining whether a treaty was self-executing or not "perhaps one of the most confounding in treaty law."

Treaties have been held to be self executing when their terms clearly convey such an intention and when detailed standards are provided for executive-administrative application. When treaties impose obligations intended to be discharged through legislative action they are considered non self-executing. Cook v. U.S. 288 U.S. 102, 119 (1933). When the terms of a treaty import a contract, and the parties to the treaty

promise to perform a particular act, and then legislation is necessary before it can be considered binding upon the courts. Foster v. Neilson 27 U.S. 253, 314.

If we look to the language of the Convention and Protocol, we find, first, that the parties are referred to as "contracting" states in conformity with Chief Justice Marshall's definition. But, more important, we find that the language of the Protocol indicates that legislation is expected, to carry out the terms of the contract. The Protocol states:

Article III
Information on National Legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol. (Emphasis supplied).

It would therefore appear that the

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Protocol intended and required domestic legislation by the contracting states to ensure the application of its terms, and that it was not a self-executing treaty.

The fact that legislation domestically was necessary to determine refugee status was recognized by the Office of the United Nations High Commissioner for Refugees (5):

"189...the 1951 Convention and the 1967 Protocol define who is a refugee for the purposes of these instruments. It is obvious that, to enable States Parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in

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- (5) Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Geneva, September 1979, Page 45.

the 1951 Convention...is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure."

Paul Weis, former Director of the Legal Division of the Office of the United Nations High Commissioner for Refugees, similarly recognized the lack of the binding effect of the definition of "refugee" in the Convention and Protocol(6):

"The description of international and national legislation shows the importance of refugee character, as the applicability of this legislation depends on the fact that the person meets the definition of refugee in the

(6) Weis. The Development of Refugee Law
Transnational Legal Problems of Refugees;
Michigan Yearbook of International Legal
Studies, Clark Boardman Company,Ltd. (1982)

relevant instrument, normally the 1951 Convention, as amended by the 1967 Protocol. Moreover, a considerable number of countries party to the Convention and Protocol have adopted this definition as the criterion for the granting of asylum, although no such obligation exists under these instruments.

In 1980 the required legislation was passed, which incorporated the Protocol definition of "refugee" into the Immigration and Nationality Act. However, during the twelve years between 1968 and 1980, although we had pledged to conform our domestic legislation to our obligation under the Protocol, we had, in fact, made no changes at all, either administratively or legislatively. Recognition of the Protocol hinged upon incorporating the Protocol definition of "refugee" into domestic law, but we did nothing.

If we had considered the treaty to be

self-executing, then with accession alone, we should have begun to use the Protocol definition of "refugee", a person who has a "well-founded fear of persecution" instead of continuing to use "the clear probability of persecution" standard. In fact, the treaty was regarded domestically as a political act, and non-self-executing. But why was domestic legislation not passed?

This problem was clearly focused in In re Dunar, 14 I & N Dec. 310 (1973), when a Hungarian refugee who had lived in the non-communist world for the previous fifteen years and had escaped from Hungary during the uprising of 1956, requesting withholding of deportation, "non-refoulement" under the standards of the Convention and Protocol.

The Board of Immigration Appeals, as there was no enacting legislation, which should normally have followed a non

self-executing treaty, proclaimed that the Protocol, which incorporated the standards of the Convention, was a self-executing treaty. Then, noting that a self-executing treaty supersedes a prior Congressional enactment, if the two are inconsistent (Cook v. United States, 288 U.S. 102,118), but that if both relate to the same subject, attempt should be made to give effect to both (Whitney v. Robinson, 124 U.S. 190,194), the board proceeded to state that "well-founded fear" and "clear probability of persecution" were equivalent. By this reasoning, based upon an erroneous first premise, that the Protocol was self-executing, the Board was able to accomplish the following: (1) to justify why Congress had not passed any enacting legislation although we adhered to the Protocol six years previously; (2) to establish that the United States took its

treaty commitments seriously, and was not violating any treaty obligations; (3) to maintain the image of the United States foreign policy interests through reaffirming our commitment to the Protocol.

Mr Dunar's case was not one of speculation supported by no objective evidence. In fact, he may well have established aprima facie case for "well-founded fear of persecution"; but the "clear probability" standard is impossible for most persons to meet.

It is impossible to speculate at this time, but perhaps if the Board had decided differently, the Refugee Act of 1980 might have been the Refugee Act of 1974.

B.Until The Refugee Act Of 1980, The United States Lacked A Commitment To A Formal Refugee Policy And Individual Laws Were Passed In Response To Emergent World Crises. With The Passage Of The Refugee Act Of 1980, Formal Standards For Determining Refugee Status Were Promulgated For The First Time, Which Standards Were To Be Used For Determining Eligibility For Withholding Of Deportation For Feared Political Persecution.

This country was, to a large extent, originally settled by refugees from European political oppression, who came to the New World to seek a new life. But there was no necessity, until this century, for a formal refugee policy as they came with the normal flow of immigrants, and provided the labor on one hand, and the intellectual passion for freedom, on the other, that built this nation.

The problem has arisen with the maturity of the nation, as we now wish to protect our citizenry from economic competition, a valid concern. Thus our fear, apparent at every turn, of opening up the proverbial "floodgates" has clouded our reason.

Prior to the Refugee Act of 1980, a definition of "refugee" was absent from the Immigration and Nationality Acts, and the administrative Code of Federal Regulations

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relating to Aliens (8 CFR) contained no standard whatsoever for determining refugee status.

The determination of who was to be eligible for the Attorney General's discretionary withholding of deportation, was made in the discretion of the Attorney General.

Section 243 (h) of the Immigration and Nationality Act of 1952, as amended by the Act of October 3, 1965 (79 Stat 918) stated:

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion..."

While it was stated that if an alien met the standard asserted by the Attorney General for withholding of deportation, his

discretion was always exercised, nevertheless the standard was extremely harsh. A rule of "clear probability of persecution of the particular individual" was adopted, and crystallized in the decisions of Lena v. INS 379 F. 2d 536, 538, and Cheng Kai Fu v. INS 386 F. 2d 750 (2nd Cir. 1967) cert denied 390 U.S. 1003 (1968).

The clear probability rule required strong objective evidence in its support, such as a history of previous political incarceration. It discounted any form of subjective fear, unless supported by the aforesaid kind of "objective evidence", which was usually impossible to obtain.

As an example, in Matter of Ian, 12 I & N Dec. 564 (BIA 1967) withholding of deportation was denied for failure to show a "clear probability of persecution" of a Chinese alien who documented a "well-founded

fear of persecution in Indonesia", where, as an ethnic minority, the Chinese were persecuted and her father's bakery had been the subject of mob violence.

In Matter of Francois, 15 I & N Dec. 534 (BIA 1975), the Board stated that an alien whose father had been murdered by the Duvalier regime in Haiti because of his political opinion, and where other members of the family had been killed upon return to Haiti after fleeing to the Bahamas, had failed to meet his burden of proof on a section 243 (h) claim. Withholding of deportation was denied for want of a "well-founded fear of persecution", although it is clear that the "clear probability" standard of near certainty was in fact used.

While the United Nations Protocol language was referred to, the standards were not at all used in domestic judicial or

administrative decisions.

In Matter of Joseph 13 I & N Dec. 70 (1968), withholding of deportation was granted to a Haitian who had been imprisoned prior to leaving Haiti; had published an anti-regime newspaper there, and had been active in anti-Duvalier movements since leaving Haiti. The basis for granting withholding was "clear probability of persecution", but it should be noted that even with this outstanding set of facts, 243 (h) relief had been previously denied by the District Director, so stringent have the requirements been for "clear probability".

With the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 et seq., a definition of "refugee" was for the first time inserted in the Immigration and Nationality Act.

This definition, Section 201 (a) (42) of the Act, designed to conform with the definition of 'refugee' of the United Nations Protocol Relating to the Status of Refugees, states:

"The term "refugee" means (A) any person who is outside any country of such person's nationality, or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of, the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion..."

From no standard determining who should not be deported, a well-thought-out standard in conformity with our obligations under the United Nations Protocol, to which we had adhered twelve years previously, was adopted.

Under the Protocol, the term "refugee"

was held to mean any person who:

"...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality, and who is unable or, owing to such fear is unwilling to avail himself of the protection of that country..."

Additionally, the Code of Federal Regulations, previously naked of any guidelines for determining who would be granted asylum or relief from deportation on political grounds, was amended, and 8 C.F.R. § 208.5, "Burden of Proof" now reads:

"The burden is on the asylum applicant to establish that he/she is unable or unwilling to avail himself or herself of the protection of the country of such person's nationality, or, in the case of a person having no nationality, the country in which such person habitually resided, because of persecution or a well-founded fear of persecution on account of race, religion, membership in a particular social group, or political opinion."

This was the first time that there were any such regulations, except for the ad hoc opinions of the immigration judges, who, lacking a set of clear rules, relied upon a rule of xenophobia, ignoring the criteria of the U.N. Protocol, although occasionally we find if not the spirit of the Protocol, its phraseology, as in Matter of Francois(supra).

Section 243 (h) of the Act was also amended, making withholding of deportation mandatory if the alien met refugee criteria:

"The Attorney General shall not deport or return any alien...to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

However, even with the passage of the Refugee Act, and with the passage of administrative regulations, there was still no change in the standards applied by the

Attorney General.

The petitioner would have us believe that no change was necessary because in fact the two standards were equivalent, relying upon In re Dunar, and its followers. In fact, administrative failure could be one of the reasons.

The Congressional Record of May 4, 1983, S 6035, contains a reprint of an Immigration Service report on Asylum Adjudications, introduced into the record by Senator Kennedy:

"The question frequently asked is 'Is the current law with regard to asylum adjudications workable?' We do not know the answer because INS was never able to implement fully the asylum provisions of the 1980 Refugee Act. For this most difficult time-consuming and politically controversial work, we neither trained our officers, developed comprehensive final regulations and operating instructions or gave priority to the effort."

While it is true that an application for withholding deportation and an application for asylum are not the same, they are equivalent. An application for asylum, under current regulations is considered an application also for withholding of deportation, and the standards for both are the same: there must be a "well-founded fear of persecution".

Moreover, Section 243 (h) has always been generally regarded as the section of the Act designed to aid refugees in the United States (7)

That the service has not been able to change entrenched ways of thinking, just because there is now a law, does not mean that the standard has not changed, or that the courts should defer to decisions that are

(7) 111 Cong. Rec. 21,755; 21,268-69 (1965).

not in accordance with the law.

C. With The Passage Of The Refugee Act Of 1980, Determination Of Eligibility For Withholding Of Deportation In The United States Must Be Made Under The U.N. Protocol Standards

In September 1979, the Office of the United Nations High Commissioner for Refugees in Geneva issued a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

This book codified the standards used by the office of the United Nations High Commissioner for Refugees, which had been previously available in advisory form. It states: (emphasis supplied)

"37. The phrase 'well-founded fear of being persecuted' is the key phrase of the refugee definition. It reflects the views of its authors as to the main elements of the refugee character..."

Its analysis of the standard for

determining refugee status shows how far apart the Protocol standard is from the "clear probability" standard.

37. "Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin."

38. "To the element of fear...is added the qualification 'well-founded'... that this frame of mind must be supported by an objective situation."

40. "An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant..."

41. "An assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership in a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal

(43)

experiences - in other words, everything that may serve to indicate the predominant motive for his application is fear..."

42. "A knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility..."

43. "These considerations need not necessarily be based on the applicant's own experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied will be relevant..."

45. "It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word fear refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution..."

Consider the standards applied to Mr

Stevic. He is a university graduate in philosophy, perhaps more aware than a laborer of the political conditions in his country of origin. His father-in-law and members of the anti-communist groups in the United States in which he is active have been imprisoned because of "hostile propoganda" laws. The province in which he lived and taught, is in such a state that the churches are being burned. He has never been imprisoned in Yugoslavia, so he cannot show a "clear probability". But would anyone deny that he has a well-founded fear, based upon both subjective and objective elements.

We adopted the United Nations language in our domestic law to demonstrate our international commitment to the ideals set forth in the United Nations Convention and Protocol. Can we then ignore the meaning of that language, especially when such great

efforts have been made by the office of the High Commissioner of Refugees to be absolutely certain that that meaning is understood.

D. What Is The Standard Used Now?

Despite the government's contention that the terms "clear probability of persecution" and "well-founded fear of persecution" are interchangeable, supported by the decision in Rejaie v INS 691 F 2d 139 and historically supported by In Re Dunar 14 I & N. Dec. 310 (BIA 1973), it appears that the United States government in practice since the Stevic case which directly followed the Refugee Act of 1980, has publicly adopted the standard of the Refugee Act of 1980 or "well founded fear of persecution".

The most notable case, well publicized in the press this year, involved a Chinese tennis player, Hu Na. In granting her political asylum of April 4, 1983, Arthur Brill, speaking for the Justice Department, stated:

"Ha Na has been granted asylum under the Refugee Act of 1980, which provides that asylum can be granted in cases where the applicant establishes a well-founded fear of persecution, due to their race, religion, nationality, political opinion, or membership in a specific social group."

In this case, reported in the New York Times on April 5, 1983, page A-1, Ms. Hu could not have demonstrated a "clear probability of persecution", as her subjective fear of persecution was prospective in her feeling that because of her unwillingness to join the Communist Party in China, she would be politically vulnerable were she to return to China.

On February 26, 1983, the New York Times also reported the granting of political asylum to a white South African, Dominic Holzhaus, who opposed his country's system of apartheid.

In granting asylum, Paul Kuznich, a State Department spokesperson, said:

"Asylum is granted by the United States on the grounds of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion."

(47)

Clearly, despite the debate that is taking place in this Court, the government---the Department of State and the Department of Justice---has already made its decision.

It is time for the courts to follow.

CONCLUSION

The judgment of the Second Circuit Court of Appeals should be upheld as the Refugee Act of 1980 changed the standard an alien must meet in order to avoid deportation on the ground that he would be subject to persecution in the country of deportation.

Respectfully submitted.

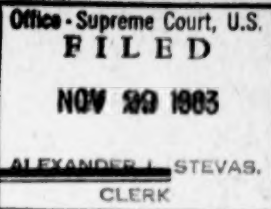
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No. 82-973



In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent and amici have attempted to obscure the issue before this Court by discussing a host of tangential matters and by mischaracterizing the government's approach to withholding of deportation relief. Our position on the question presented, simply stated, is the following: The United States' accession to the United Nations Protocol in 1968 was based on the explicit understanding that such action would not alter or enlarge the substance of this Nation's immigration laws. Congress, in enacting the provisions of the Refugee Act of 1980 involved in this case, intended only to incorporate the formal terms of the Protocol into the Immigration and Nationality Act (the Act), 8 U.S.C. 1101 *et seq.* Accordingly, the Refugee Act did not alter the pre-existing

standard by which an alien is required to prove eligibility for withholding of deportation. Neither respondent nor any of the amici has presented a shred of evidence that casts doubt on the validity of this syllogism. They mention the legislative history of the Refugee Act only in passing, and they offer no explanation for the unambiguous statements in the House and Senate Reports quoted in our opening brief (at 37-40).

1. Indeed, the thrust of respondent's argument before this Court is not that the Refugee Act of 1980 changed the standard an alien must meet in order to be eligible for withholding of deportation. Rather, respondent contends that that standard was altered by the United States' accession to the Protocol in 1968. Thus, according to respondent, the United States simply ignored its obligations under that treaty during the period 1968-1980. Resp. Br. 19-30.

It is peculiar, to say the least, that during that entire period of time no one noticed this alleged "default" on the part of the United States. In particular, between accession in 1968 and enactment of the Refugee Act in 1980, not one court suggested that the United States had violated its obligations under the Protocol by continuing to apply the pre-existing standard for eligibility for withholding of deportation relief. Indeed, in his briefs in the court of appeals, respondent represented that the pre-1980 standard was "clear probability," the standard respondent now claims was displaced in 1968 by the "well-founded fear" definition of "refugee" contained in the Protocol.¹ Respondent's revisionist view of the effect of accession thus is belied by both the 1968-1980 practice as well as his own position during previous stages of this litigation.

2. Amici suggest that the 1968 legislative history (INS Br. 25-28) reflects only an understanding that

¹ Moreover, prior to passage of the Refugee Act in 1980, respondent never contended that accession to the Protocol alone had altered the standard for eligibility for withholding of deportation.

accession to the Protocol would not require the United States to *admit* greater numbers of refugees as immigrants. Office of the United Nations High Commissioner for Refugees (UNHCR) Br. 5-6; Committee on Migration and Refugee Affairs of the American Council of Voluntary Agencies For Foreign Service and Washington Lawyers' Committee for Civil Rights Under Law (collectively, ACVA) Br. 13. Amicus American Immigration Lawyers Association (AILA) contends (Br. 18) that the Senate assumed only that no statutory revisions would be required by accession, not that the administrative practice necessarily would remain unchanged. See also UNHCR Br. 7-8; ACVA Br. 14-15. A fair reading of the history of the United States' accession to the Protocol refutes both contentions.

a. As we noted in our opening brief (at 26), Office of Refugee and Migration Affairs Acting Deputy Director Laurence A. Dawson's statement to the Senate Foreign Relations Committee contained an unequivocal assurance that accession to the Protocol would not alter the extent of the United States' authority to return or expel aliens already in this country (S. Exec. Rep. 14, 90th Cong., 2d Sess. 6 (1968)):

[T]he asylum concept is set forth in its prohibition under Article 33 of the Convention against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in a territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol, without amendment of the Act.

See also INS Br. 26-28.

Ignoring this clear evidence that accession was not intended to alter substantially United States law relat-

ing to deportation, amici focus instead on Dawson's introductory remark (S. Exec. Rep. 14, *supra*, at 6) that "accession does not in any sense commit the Contracting State to enlarge its immigration measures for refugees." But even that isolated comment does not support amici's contention that the assurance given by the Executive Branch was only that the Protocol would not require the United States to admit additional numbers of refugees. The ensuing dialogue makes clear that the Senators and Dawson were using the word "immigration" not in the narrow sense of the initial admission of aliens to this country as permanent residents, but rather to refer generally to all matters concerning our treatment of aliens.² Thus, when Senator Sparkman subsequently asked Dawson whether anything in the Protocol "conflicts with our existing *immigration* laws" (S. Exec. Rep. 14, *supra*, at 8; emphasis added), Dawson responded with an analysis of whether Article 32 of the Convention,³ which governs the expulsion of refugees lawfully within a country, could be reconciled with Section 241 of the Immigration and Nationality Act, 8 U.S.C. 1251, which enumerates the classes of "deportable aliens."

In response to questions specifically concerning the admission of refugees, Acting Deputy Director Dawson also assured the Senate Foreign Relations Committee that "there is nothing in this protocol which implies or puts any pressure on any contracting state to accept additional refugees as immigrants" (S. Exec. Rep. 14, *supra*, at 10). That assurance, however, in no way detracts from the more general theme expressed throughout the accession proceedings that the provisions of the Protocol were not inconsistent with any substantive aspect of existing United States law. See INS Br. 25-28.

² Indeed, even amici, while taking issue with our reliance on Dawson's remarks, use the term "immigration" in its broader sense (ACVA Br. 14 ("current immigration practice")).

³ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted at* 19 U.S.T. 6259. By acceding to the Protocol, a contracting party agreed to apply Articles 2 through 34 of the Convention. See INS Br. 14.

b. Amici's further contention, that Congress intended only statutory law, not administrative practice, to be unchanged by accession, is equally unfounded. As we explained in our opening brief, the history of accession shows clearly that Congress never intended by that act to alter the substance of our immigration law—whether expressed in statute, regulation or administrative practice—in any significant manner.

Comparing Article 33 of the Convention to Section 243 (h) of the Immigration and Nationality Act (8 U.S.C. (1976 ed.) 1253(h)), the Secretary of State expressly stated (S. Exec. Doc. K, 90th Cong., 2d Sess. VIII (1968); emphasis added) that the former provision could "be implemented within the administrative discretion provided by *existing regulations*." Moreover, in transmitting the Protocol to the Senate for its advice and consent, the President offered the assurance (*id.* at III; emphasis added) that accession "would not impinge adversely upon established *practices* under existing laws in the United States."⁴ Finally, as noted above, Acting Deputy Director Dawson advised the Senate Foreign Relations Committee (S. Exec. Rep. 14, *supra*, at 6; emphasis added) that "accession does not *in any sense* commit the Contracting State to enlarge its immigration measures for refugees." It therefore is simply false to suggest that the Senate anticipated that any significant change—either in the statute itself or in administrative practice—would be required by accession to Article 33 of the Convention.

The notion that the Executive Branch assured Congress only that no new legislation would be required to implement the *non-refoulement* provision of the Protocol

⁴ Amici ACVA's assertion (Br. 14 & n.38) that such representations were made only in the context of "laws and policies concerning issues such as employment, religion, free speech, and cultural identity" is not accompanied by any citation of authority and, indeed, is wholly unsupported by the relevant legislative history. See S. Exec. Rep. 14, *supra*, at 4; S. Exec. Doc. K, *supra*, at III, VII.

(Article 33 of the Convention), not that no administrative changes would be necessary, is further belied by the fact that the INS, following accession, in fact made no change in the substantive standard for eligibility for withholding of deportation.⁵ The BIA early on held that no such change was necessary (*In re Dunar*, 14 I. & N. Dec. 310 (1973)), and no court ever suggested that the failure to alter the administrative practice violated either our obligations under the Protocol or the assurances given Congress during the 1968 accession proceedings. See INS Br. 28-32.

3. Amicus Lawyers Committee for International Human Rights (Lawyers Committee) contends (Br. 26-32) that, subsequent to accession, members of Congress became concerned that the provisions of the Protocol were not being implemented and that the Refugee Act of 1980 was intended to alter that pre-1980 practice. See also American Civil Liberties Union and International Human Rights Law Group (collectively, ACLU) Br. 22. The intervening (1968-1980) legislative history on which amicus relies (Lawyers Committee Br. 26-32) does not support this assertion.

⁵ As we noted in our opening brief (at 14), in 1974 the Attorney General promulgated regulations setting forth *procedures* by which aliens at our borders or within this country could apply for "asylum." 8 C.F.R. 108 (1975). No substantive standard for eligibility was prescribed by the regulations until 1979, when the regulations were amended to provide that "the applicant for asylum has the burden of satisfying the immigration judge that he would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, as claimed." 8 C.F.R. 108.3 (1980). In making this amendment, the Attorney General expressly dismissed any objection "to the apparently differing standards of proof employed by the Service, on the one hand, and specified in the [Protocol], on the other * * * [as] one of semantics." 44 Fed. Reg. 21257 (1979). "[I]n this connection [he] * * * point[ed] out that the United States Senate in hearings and proceedings leading to ratification of the [Protocol] indicated explicitly that they [sic] did not intend adoption of the [Protocol] to modify existing immigration law in any respect." *Ibid.*

a. Most notably, the immigration measures that were introduced into Congress during the years following accession would have amended only the entry provisions of the Act, in particular, conditional entry under former Section 203(a)(7), 8 U.S.C. (1976 ed.) 1153(a)(7). But the Protocol restricts contracting states only with respect to the expulsion or return of refugees; nothing in that document obligates the parties to it to admit additional numbers of refugees. Accordingly, the proposed legislation on which amicus relies⁶ can hardly be construed as expressing dissatisfaction with the INS's implementation of the Protocol provisions.

Furthermore, the proposals to make eligibility for conditional entry dependent on the Protocol definition of "refugee" reflect an intent only to make such relief available on a nondiscriminatory, worldwide basis, not to alter the substantive standard governing eligibility for relief. Contrary to the assertion that the post-1968 legislation was a response to accession, the history of the bills on which amicus relies clearly indicates that their purpose was to "continu[e] the reform effort initiated in the Immigration Act of 1965" (119 Cong. Rec. 35734 (1973) (remarks of Sen. Kennedy)) "to provide for equal and uniform treatment of all countries" (*id.* at 31360 (remarks of Rep. Eilberg)).⁷ The proposed legislation thus was intended to extend worldwide the preference system that had been established for the Eastern Hemisphere in 1965. 121 Cong. Rec. 29946-29947 (1975) (remarks of Sen. Kennedy); 119 Cong.

⁶ S. 3202, 91st Cong., 1st Sess. (1969); S. 2643, 93d Cong., 1st Sess. (1973); H.R. 981, 93d Cong., 1st Sess. (1973); and S. 2405, 94th Cong., 1st Sess. (1975).

⁷ See also 121 Cong. Rec. 29946 (1975) (remarks of Sen. Kennedy); 115 Cong. Rec. 36965 (1969) (remarks of Sen. Kennedy).

Rec. 35734 (1973) (remarks of Sen. Kennedy); 115 Cong. Rec. 36965 (1969) (remarks of Sen. Kennedy).⁸

To the same end of eliminating discrimination in the Nation's immigration practices, the proposed legislation would have removed the geographic and ideological restrictions on eligibility for conditional entry under former Section 203(a)(7). As we discussed in our opening brief (at 12), those seeking admission under former Section 203(a)(7) were required to show, *inter alia*, that they had fled from a Communist or Communist-dominated country or area or from a country in the Middle East. 8 U.S.C. (1976 ed.) 1153(a)(7)(A)(i). The proposed legislation would have made eligibility for such relief dependent on fulfillment of a variant of the Protocol definition of "refugee." The legislative history of each of the bills on which *amicus* relies makes clear that the sole purpose of this amendment was to broaden "[t]he definition of a refugee * * * from its present European and cold war framework, to include the homeless throughout the world." 115 Cong. Rec. 36966 (1969) (remarks of Sen. Kennedy); 119 Cong. Rec. 35734 (1973) (remarks of Sen. Kennedy).⁹ Not once was it

⁸ The 1965 legislation had abolished the national origins system of selecting immigrants and had replaced it with an annual pool of 170,000 visas available for applicants in Eastern Hemisphere countries. These visas were allocated among seven preference categories for relatives of United States citizens, skilled and professional persons and refugees, with a maximum of 20,000 visas going to the applicants in each country. Immigration from the Western Hemisphere was limited to 120,000 annually, with no per-country limit and no preference system. 119 Cong. Rec. 31360 (1973) (remarks of Rep. Eilberg); 115 Cong. Rec. 36965 (1969) (remarks of Sen. Kennedy).

⁹ See also 121 Cong. Rec. 29947 (1975) (remarks of Sen. Kennedy); 119 Cong. Rec. 35737 (1973) (remarks of Sen. Kennedy); *id.* at 31363 (remarks of Rep. Holtzman); *id.* at 31360 (remarks

suggested that adoption of the Protocol definition would alter the standard an individual alien must meet in order to be eligible for relief or that such a change was necessary because existing administrative practices did not conform to Protocol standards.

b. The isolated statements made by members of Congress during consideration of the predecessor bills to the Refugee Act of 1980 on which amicus relies (Lawyers Committee Br. 30-32) also do not support its assertion (*id.* at 26) that Congress had become "concerned about the failure to implement the Protocol." Contrary to amicus' representation (*id.* at 30-32), Representative Holtzman in 1977 was not questioning the substantive standard the INS was applying in withholding and asylum proceedings. Rather, her concern was with the procedures by which it was determined whether aliens met that standard. See *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 126-127 (1977).*¹⁰

of Rep. Eilberg); *Western Hemisphere Immigration: Hearings on H.R. 981 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 305, 326 (1973).*

¹⁰ The excerpt from Representative Holtzman's remarks quoted at page 31 of amicus' brief appears in the following context (*Admission of Refugees Into the United States, supra*, at 126-127 (emphasis added)):

One of the matters that has concerned me greatly about the admission of refugees and persons who seek asylum is the fact that there really are no specific *procedures* that would assure that due process is granted when such persons are questioned in order determined [*sic*] whether or not they meet the *present statutory standards*. * * *

I wonder if you have any concern that as part of a bill dealing with the problem of refugees we ought to try to insure

Likewise, the dissatisfaction expressed by Representative Eilberg in 1978 had nothing to do with any alleged "failure [by INS] to fulfill the spirit of the Protocol" (Lawyers Committee Br. 32). Rather, Representative Eilberg's impatience related to the manner in which the Attorney General had exercised his discretion under Section 212(d) (5) of the Act, 8 U.S.C. (1976 ed.) 1182(d) (5), to parole aliens into this country temporarily (*Admission of Refugees Into the United States: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Cong., 1st & 2d Sess., Pt. II, 15 (1977 & 1978) (emphasis added)*) :

For years, we have received assurances, [Attorney General] Bell, from the Justice Department, prior to your coming onboard particularly from INS Chairman Chapman, who we worked with very closely, that criteria, guidelines, and regulations would be promulgated *to cover the conditions of parole*, so we don't go through this agonizing experience every time we do our job.

* * * * *

that due process will be granted by spelling out—but not in an overly detailed manner—the kinds of *procedures* that should be used.

* * * * *

The reason I raise this is because when Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch. I am concerned because although I think the definition in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution, *we don't specify how that well-founded fear is to be ascertained*, or whether a person has a right to be questioned about the presence or absence of that well-founded fear in his or her own language. Don't you agree that *the method by which a determination as to whether or not someone is a refugee is made should be spelled out in some detail?*

Would you consider the issuance of guidelines and procedures to be followed *in utilizing your parole authority*, at least until our proposed refugee legislation is enacted?

See also INS Br. 15-16.¹¹

4. Amici's reliance on post-enactment legislative history is equally unavailing. We note in particular amici ACVA's reference (Br. 23-24 n.64) to Senator Kennedy's expression of approval of the result reached by the Second Circuit in this case. See 129 Cong. Rec. S6940-S6941 (daily ed. May 18, 1983). Senator Kennedy made his remarks, however, in the context of arguing in favor of the inclusion of judicial review provisions in the Immigration Reform and Control bill then under consideration. He thus was not endorsing the legal ruling of the court of appeals that the appropriate standard was something less stringent than "clear probability," but simply approving of the availability of a judicial forum following the BIA's denial of relief. See *id.* at S6940. Because of the ground on which the Second Circuit disposed of this case, that court did not reach the question whether the BIA's decision would have been set aside under the standard we urge here as well.

¹¹ The most relevant legislative history is, of course, that of the Refugee Act of 1980 itself. As we showed in our opening brief (at 36-40 & n.37), that history is replete with evidence that Congress's intent in adopting the Protocol definition of "refugee" was to make eligibility for relief under the Act available on a worldwide basis, not to alter the standard an individual alien must meet. Amici's reliance (Lawyers Committee Br. 36-37; American Jewish Committee Br. 5-6) on a remark made during the 1979 hearings on behalf of the governor of the State of Michigan—that the new definition "will facilitate bringing refugees into this country" (*Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 284 (1979))—is in no way to the contrary. Surely a definition that eliminated the requirement that aliens have fled a Communist, Communist-dominated or Middle Eastern country would "facilitate bringing refugees into this country."

Moreover, in light of some of the misstatements of amici, it is worth reiterating that our position in this case is that the Refugee Act of 1980 did not change the standard an alien must meet in order to be eligible for withholding of deportation, *not* that the Act "wrought no change in the pre-1980 law" (ACVA Br. 26; emphasis added; footnote omitted). Indeed, we observed in our opening brief (at 15; emphasis added) that "[i]n the Refugee Act of 1980, Congress made *extensive* revisions in the immigration laws in order to establish a permanent systematic procedure for the admission of refugees to the United States and for their resettlement once here." Assistant Secretary of State Abrams' remark in 1983 that "'the Refugee Act of 1980 radically revised U.S. refugee and asylum law and procedures'" (ACVA Br. 26, quoting *Refugee Assistance: Hearings on H.R. 3195 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 56 (1983)) is entirely consistent with our own observation.

5. In our view, the only inquiry required by this case is whether Congress intended the Refugee Act of 1980 to alter the substantive standard applicable to withholding of deportation relief. Once that question is answered in the negative, the inquiry should be at an end. Amici nevertheless devote the bulk of their presentation to questioning the content of that substantive standard, and particularly the validity of the "singling out" aspect of the standard.¹² Although this issue is not properly before the Court, a brief response is warranted.

¹² Amici ACVA (Br. 6-9) purport to object to the "singling out" criterion on the ground that it impermissibly limits the type of evidence that will be considered in support of a claim for withholding of deportation or asylum relief. We agree with amici (Br. 3) that the question presented by this case is not "simply one of verbal formulation." See INS Br. 21. We do not agree, however, that the issue concerns the *type* or *amount* of evidence required. Rather, the question is simply what is the correct standard, *i.e.*, what must an applicant prove, by whatever type or amount of evidence, in order to establish eligibility for relief.

Imposition of a requirement that an alien demonstrate, by objective facts, a realistic likelihood that he would be singled out for persecution if returned to his homeland effectuates the purpose underlying both the Protocol and the Refugee Act of 1980. It is an unhappy fact of life that citizens of few other countries enjoy the freedom and opportunity available within the United States. But neither the Protocol nor the Refugee Act was intended to provide refuge for every victim of harsh, or even repressive, government. Rather, those measures were intended to protect individuals who would be persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion." The "singling out" criterion simply expresses this requirement that an alien be distinct—on the basis of one of the enumerated grounds—from the remainder of the population in his country of nationality, all of whom might be subject to "persecution" in some sense.

This does not mean, as amici suggest, that evidence of persecution of other members of a group to which the applicant belongs is not considered. Evidence of persecution of others in similar circumstances surely is relevant to the question whether the applicant also would be singled out for persecution, and the INS and BIA regularly take such evidence into account. See, *e.g.*, *In re Salim*, Interim Dec. No. 2922 (BIA Sept. 29, 1982) (member of Mujahidin rebels in Afghanistan found to establish requisite probability of persecution); see also INS Br. 23-24 & n.25.¹³ The "singling out" test is applied simply to

¹³ Amici challenge the INS standard on the ground that it fails to take account of situations in which "persecutory action * * * is aimed at a group, or is generalized, or is even random" (ACVA Br. 7). At the outset we question whether action that is generalized or random would meet the threshold statutory requirement discussed in the text above, that the applicant's life or freedom would be threatened "on account of race, religion, nationality, membership in a particular social group, or political opinion." In any event, the situations posited by amici have nothing to do with this case. Respondent's request for withholding of deportation is not premised on "a situation where an entire population or a whole social group

exclude those who would seek admission to this country on the basis of generalized, unpleasant conditions in their own homelands. See, e.g., *Martinez-Romero v. INS*, 692 F.2d 595, 595-596 (9th Cir. 1982) ("[i]f we were to agree with the [alien's] contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely. There must be some special circumstances present before relief can be granted"); *In re Surzycki*, 13 I. & N. Dec. 261, 262 (BIA 1969) (denying withholding of deportation to an alien who "is in no different position than any other Polish person in Poland, and there is nothing * * * to show he would in any way be singled out for persecution as claimed").¹⁴

is threatened with extinction, or where it is clear that persecutory measures are applied completely at random" (1 A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 175 (1966)). Rather, he claims that he would be persecuted because of his own alleged anti-communist stance and associations. (We noted in the petition (at 7 n.8) that respondent's alternative claim, that if he returned to his home town of Gnjilane he would be killed by the Albanians because he is a Serb, is not cognizable under our immigration laws. "A[n alien] is deported to [a] country, not a city or province" (Pet. App. 31a).) In these circumstances, the Court need not accept the invitation of amici to determine whether the "singling out" criterion would be applicable to every conceivable claim of persecution.

¹⁴ Accordingly, background information concerning general conditions in the receiving country alone usually will not establish eligibility. Nevertheless, the INS and the Board do consider such information relevant to the assessment of the likelihood of persecution of an individual applicant. See, e.g., *In re Exame*, Interim Dec. No. 2920 (BIA Sept. 3, 1982), slip op. 3-5 (asylum applicant entitled to present background information relating to general conditions in receiving country). Amici therefore err in suggesting (ACVA Br. 21-23) that the vitality of the "singling out" criterion is belied by post-Refugee Act proposals that immigration judges take into consideration country reports prepared by the Department of State and receive training in international law and relations.

Amici's objection to the use of the "singling out" standard may arise, in part, from a misunderstanding of the way in which that standard is applied. Respondent asserts (Br. 13) that he could not meet the current INS standard because "he could not produce a bullet with his name on it, or a Yugoslavian police look-out list." See also *id.* at 18, 33, 44 ("[h]e has never been imprisoned in Yugoslavia, so he cannot show a 'clear probability'"). In the same vein, amicus Amnesty International tells the Court (Br. 7) that "[i]f the INS position is accepted, it will continue to be difficult for aliens to obtain relief from deportation unless they can prove by objective evidence that there is a prison cell or a bullet reserved for them in the receiving country." See also Lawyers Committee Br. 4, 8, 12, 15. It is not the government's position, however, that an alien must establish that he *has been* identified and singled out for persecution by the receiving country; an alien need only show a realistic likelihood that he *would be* so singled out if returned. See, e.g., INS Br. 10, 23, 32-33 & n.32. Despite amici's repeated, baseless assertions (AI Br. 32, 41, 60; ACVA Br. 24; AILA Br. 3, 6, 15), an alien need not show a near certainty of persecution.¹⁵

Amici likewise mischaracterize the INS standard as requiring more than the applicant's own testimony, *i.e.*, as requiring documentary or live corroboration to which a bona fide refugee frequently might not have access. As we pointed out in our opening brief (at 24-25), however, the BIA has long recognized that an alien's "own testimony may be the best—in fact the only—evidence available to her" (*In re Sihasale*, 11 I. & N. Dec. 759,

¹⁵ Both respondent (Br. 43-44) and amici (AI Br. 8; AILA Br. 9-10) dwell on the facts of respondent's case in an attempt to emphasize the stringency of the INS's standard. As we observed above (page 11, *supra*), however, no court has yet determined whether the denial of respondent's motion to reopen was a correct application of the current standard. That is the issue the court of appeals should address on remand.

762 (BIA 1966). That testimony alone may provide the objective facts demonstrating a realistic likelihood that the applicant would be singled out for persecution if returned.

Respondent and amici also object to the current standard on the ground that it "read[s] the subjective element of 'fear' out entirely" ACVA Br. 10; see also Resp. Br. 33; AI Br. 46-47; UNHCR Br. 25. To be sure, the applicant's subjective fear is not the matter on which immigration judges or officers have focused in assessing a claim for withholding of persecution. In the first place, "[t]he adjective 'well-founded' suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that this claim should be measured with a more objective yardstick." 1 A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 173 (1966). Moreover, the subjective element of fear is virtually implicit in an application for withholding of deportation or asylum relief (*id.* at 174) :

[T]he frame of mind of the individual hardly matters at all. Every person claiming * * * to be a refugee has "fear" ("well-founded" or otherwise) of being persecuted * * *.

In these circumstances, it is not, as amici assert, that we have "read out" of the statute the subjective component. Rather, because the applicant's subjective fear is the more readily satisfied element of the statutory standard, administrative inquiry and focus naturally shift quickly to the objective element.

6. Finally, respondent (Br. 44-45) and amici (AI Br. 61; AILA Br. 21; UNHCR Br. 28; ACVA Br. 15-16) urge the Court to construe the Refugee Act of 1980 as changing the standard for eligibility for withholding of deportation in order to avoid placing the United States in breach of its international obligations.

The rule of statutory construction "that an act of congress ought never to be construed to violate the law of

nations, if any other possible construction remains" (*Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)) does not advance respondent's position. As we stated at the outset, our submission is that Congress's unambiguous intent in enacting the Refugee Act of 1980 was not to alter the standard for eligibility for withholding of deportation or asylum relief. Effectuation of that congressional intent would not place the United States in breach of its international obligations. Respondent's and amici's argument to the contrary assumes that there is an internationally accepted construction of the word "refugee" more lenient than that applied by the BIA. There is not.

Under general principles of international law, only the parties to a treaty can authoritatively interpret its provisions. See *Draft Convention on the Law of Treaties*, 29 Am. J. Internat'l L. Supp. 654, 973 (1935). Indeed, as we noted in our opening brief (at 33), the UNHCR acknowledges in its *Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 1 (*Handbook*) (Geneva 1979) that "[t]he assessment as to who is a refugee, i.e., the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee finds himself at the time he applies for recognition of refugee status." By agreement, parties may entrust that interpretative power to some other state or body. The parties to the United Nations Protocol have agreed that the settlement of "[a]ny dispute between States parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute." United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, Art. IV, 19 U.S.T. 6226. During the more than 15 years in which the Protocol has been in effect, however, no party has invoked the International Court's

jurisdiction with respect to the construction of the word "refugee." In the absence of any ruling by the body charged with the interpretation of the Protocol, it can hardly be said that there is an internationally accepted construction of the word "refugee" contained therein.

Furthermore, notwithstanding respondent's and amici's heavy reliance on the *Handbook*, the UNHCR's function under the Protocol is not an interpretative one. By contrast to the role entrusted to the International Court of Justice, the UNHCR is charged with supervision of the *application* of the provisions of the Protocol. See Art. II, 19 U.S.T. 6226.¹⁶ The UNHCR acknowledged its own limited role in the *Handbook* itself (at 2; emphasis added), which it offered "for the *guidance* of government officials concerned with the determination of refugee status in the various Contracting States." Accordingly, any divergence of our views from those expressed by the UNHCR in this case¹⁷ reflects no violation of our international obligations.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed and the case remanded to that court for disposition of respondent's petition for review under the standard that has been consistently applied by the Board of Immigration Appeals.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

¹⁶ "Interpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow a given situation." 29 Am. J. Internat'l L. Supp. 938.

¹⁷ As we explained in our opening brief (at 34-35), we do not view our construction of the "refugee" definition as necessarily inconsistent with the explanation contained in the *Handbook*.

AUG 29 1983

ALLAN L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

PREDRAG STEVIC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
and INTERNATIONAL HUMAN RIGHTS LAW GROUP,
AMICI CURIAE, IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The International Human Rights Law Group ("IHRLG"), a nonprofit, public interest law office established in Washington, D.C. in 1978, seeks to promote respect for and adherence to human rights norms in all nations including the United States.

At issue in this case is the determination of the applicable standard which must be satisfied by an alien seeking political asylum in order to avoid deportation. The standard adopted by this Court is crucial, not only to the long-standing tradition in American jurisprudence of protecting individual liberties from abuse, but particularly to aliens who face

* The parties have consented to the filing of this Brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

severe deprivations of liberty both from deportation itself and from what can and often does occur to them thereafter.

Because the ACLU and the IHRLG believe that the issue here was correctly decided by the U.S. Court of Appeals for the Second Circuit, amici submit this brief in support of respondent and urge affirmance of the judgment below.

SUMMARY OF ARGUMENT

The applicable standard for resolving requests of political asylum is the "well-founded fear" of persecution standard, a standard which is supported by this Court's repeated recognition of the importance of safeguarding individual liberties against the risks of factfinding error, and which is compelled by Congress' express adoption of this international law standard in the Refugee Act of 1980.

1. In this Court's burden of proof decisions, see, e.g., Woodby v. INS, 385 U.S. 275 (1966) (deportation); see also, Santosky v. Kramer, 455 U.S. 745 (1982) (termination of parental rights); Addington v. Texas, 441 U.S. 418 (1979) (civil commitment), the Court has continuously safeguarded individuals and their liberties by imposing the risks of an erroneous factual determination on the government rather than upon the individuals whose liberties were threatened. This historic tradition of our American jurisprudence compels that the standard applicable to resolving requests for political asylum be the "well-founded fear" of persecution standard which provides greater safeguards for individual liberties than the government's proposed standard of requiring individuals to meet a "clear probability of persecution" standard which places the risk of an erroneous factual determination not on the government but on the very individuals whose liberty interests are at stake.

2. The varyingly stringent standards applied to political asylum requests prior to 1980 were modified by Congress' enactment of the Refugee Act of 1980 which adopted the internationally used definition of refugee. That definition expressly includes the "well-founded fear" standard set forth in the U.N. Protocol Relating to the Status of Refugees ("U.N. Protocol").

a. Prior to the Refugee Act of 1980, the courts, the Board of Immigration Appeals ("BIA"), and the Immigration and Naturalization Service ("INS"), applied statutorily unauthorized, and ordinarily stringent standards to different classes of aliens seeking political asylum.

b. Through its enactment of the Refugee Act of 1980, Congress consolidated the classes of individuals seeking asylum under a single standard, eliminated the previously divergent standards for resolving requests of political asylum, and expressly

adopted the U.N. Protocol definition of "refugee" entitled to asylum as an alien who has a "well-founded fear of being persecuted." Aware that this definition required no further alteration of statutory law but only administrative implementation, Congress was confidently able to insure thereafter "that U.S. law clearly reflects our legal obligations under International agreements," H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979).

ARGUMENT

The issue presented in this case invites the Court to determine the standard which must be satisfied by an alien seeking political asylum in order to avoid deportation. The answer to this question is crucial, not only to the long-standing tradition in American jurisprudence of protecting against deprivation of individual liberties, but more particularly to aliens who face drastic deprivations of liberty both from the act of deportation as

well as from the consequences which may befall them thereafter.

Throughout its Brief for the Petitioner, the government argues that an alien seeking political asylum essentially should be required to prove a "clear probability of persecution" rather than the less stringent standard of a "well-founded fear" of persecution, and also that, in any event, the different standards actually are not at all significantly different. Contrary to the government's statutory argument, we submit that Congress quite specifically intended the "well-founded fear" standard when it enacted the Refugee Act of 1980. Supportive of this standard, we further submit, is this Court's repeated recognition of the importance of protecting individual liberties when judicially allocating burdens of proof, judicial determinations which are analogous to the determination of the applicable standard here.

I. In Allocating Burdens of Proof --
Determinations Analogous to and Which
Have an Effect Similar to the Deter-
mination of the Applicable Standard
Here -- This Court Has Consistently
Recognized the Fundamental Importance
of Safeguarding Individual Liberties

Determining the applicable standard which must be met by aliens applying for political asylum in order to avoid deportation -- whether a "clear probability of persecution" standard urged by the government, or the "well-founded fear" of persecution standard set forth in the Refugee Act of 1980 -- is not necessarily a matter only of statutory interpretation. Rather, since the determination of the standard involves the same elements present in allocating burdens of proof, the legal principles governing burdens of proof constitute a compelling framework for the determination here. Consideration of these procedural fairness principles in determining the standard for political asylum in turn compels the adoption here of a standard no less harsh than the "well-founded fear" of persecution standard.

"The function of a standard of proof," this Court declared in Addington v. Texas, 441 U.S. 418 (1979), "is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." 441 U.S. at 423, quoting from In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). As this Court later observed, Addington teaches that the standard of proof applied reflects "a societal judgment about how the risk of error should be distributed." Santosky v. Kramer, 455 U.S. 745, 755 (1982).

These same considerations -- our societal judgments about reaching correct factual conclusions weighed against who should bear the risk of error -- attend the determination here of the applicable standard for resolving requests for political asylum. Even more relevant here, as the Court summarized in Santosky v. Kramer, 455 U.S. 745 (1982), is

the "level of certainty necessary to preserve fundamental fairness in a variety of . . . proceedings that threaten the individual involved with 'a significant deprivation of liberty.'" 455 U.S. at 756, quoting from Addington v. Texas, 441 U.S. 418, 425 (1979) (civil commitment), and citing Woodby v. INS, 385 U.S. 276, 285 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 125 (1943) (denaturalization).

There of course is no question that deportation involves a significant deprivation of liberty. "As the Court has emphasized, 'deportation is a drastic measure and at times the equivalent of banishment or exile.'" Costello v. INS, 376 U.S. 120, 128 (1964), quoting from Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). In fact, the deprivation caused by deportation is not only the loss of liberty occasioned by removal from this country but

also the loss that can and often does occur thereafter. "This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." Woodby v. INS, 385 U.S. 276, 285 (1966).

Based upon the severity of the deprivations caused by deportation, this Court in Woodby v. INS allocated the burden of proof in a manner which placed the risk of error in reaching factual conclusions on the government rather than on the individual whose liberties were threatened. Specifically, in determining the degree of proof which must be established by the government in a deportation proceeding, the Woodby Court rejected the government's proposed "mere preponderance of the evidence" standard and instead required the government to "establish the facts supporting deportability

by clear, unequivocal, and convincing evidence." 385 U.S. at 277, 285-86; see also, Santosky v. Kramer, 455 U.S. at 748 (similarly imposing on the government the "clear and convincing evidence" proof requirement in proceedings involving the termination of parental rights).

Although the standard of proof here is one which must be met not by the government but rather by the alien seeking political asylum in order to avoid the deprivations of deportation, the analyses used and the conclusions reached by this Court in such cases as Woodby and Santosky with regard to the degree of proof are fully appropriate to determining which standard of proof should be applicable here.

Under the government's formulation, the risk of error in determining the standard for political asylum should be borne by the very individuals whose liberty is threatened not only by deportation from this country as in Woodby v. INS, but by the political aftermath

of deportation as well. The government's argument, however, does not withstand this Court's analysis. The teachings of this Court, based on our traditions and on our society's historical judgments favoring the protection of individuals and their liberties, compel rejection of the government's proposed standard.

II. The Refugee Act of 1980 Specifically Adopted the Language of the U.N. Protocol Which Requires Evaluation of Political Asylum Requests Based on an Individual's "Well-Founded Fear of Being Persecuted"

The government in its Brief for the Petitioner at 8-11, 20-32, asserts that the varyingly stringent standards adopted by several lower courts are consonant with or at least not significantly different from the "well-founded fear" of persecution standard set forth in the U.N. Protocol and expressly incorporated into the Refugee Act of 1980.

The incorrectness of the government's argument is revealed in the quite distinct and stringent standards actually applied prior to the Refugee Act of 1980. The government's argument is also rebutted by Congress' express intent to insure through the Refugee Act of 1980 "that U.S. law clearly reflects our legal obligations under International agreements," H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979).

A. Prior to the Refugee Act of 1980, the Courts, the BIA and the INS, and the U.N. Protocol Used
Varying Standards in Evaluating Requests for Political Asylum

1. Under the Immigration and Nationality Act of 1952,
There Was No Reference to a
Proper Standard for Political Asylum

An analysis of American asylum law compels the conclusion that prior to the Refugee Act of 1980 there was no clear statutory provision which determined the proper standard to be applied in evaluating requests for political

asylum based on an alleged fear of persecution. Before 1968, the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), contained two statutory provisions governing political asylum. The first, Section 243(h), 8 U.S.C. § 1253(h) (1952), governed deportable aliens already in this country. The second relevant provision, Section 203(a)(7), 8 U.S.C. § 1153(a)(7) (1952), governed the admission of aliens seeking political asylum who were not already in this country. The latter provision, Section 203(a)(7), stated:

(a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

(7) Conditional entries shall next be made available by the Attorney General . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . (A) that (i) because of persecution or fear or persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated

country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion.

8 U.S.C. § 1153(a)(7) (1952) (emphasis added).

Under relevant INS decisions, a fear of persecution -- the standard under 203(a)(7) -- required only a showing of "good reason" for such fear. See, e.g., In re Ugricic, 14 I. & N. Dec. 384, 385-86 (Dist. Dir. 1972); In re Adamska, 12 I. & N. Dec. 201 (Reg. Comm'r 1967).

Prior to its amending in 1980, Section 243(h) stated:

The Attorney General is authorized to withhold deportation of any alien . . . to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion

8 U.S.C. § 1253(h) (1952) (emphasis added).

Section 243(h) was interpreted by the courts as requiring a showing of a "clear probability of persecution." Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390

U.S. 1003 (1968); Lena v. INS, 379 F.2d 536 (7th Cir. 1967).

The legal standard under Section 203(a) (7) accordingly was considerably less stringent than the "clear probability" test the courts read into Section 243(h). This discrepancy was explicitly recognized by the BIA in its decisions. See, e.g., In re Tan, 12 I. & N. Dec. 564 (BIA 1967).

Despite the lack of any specific language in the statute, the courts and the BIA developed two distinct criteria for evaluating requests for political asylum under Section 243(h). The BIA and INS consistently used a "likelihood of persecution" test. See, e.g., In re Janus and Janek, 12 I. & N. Dec. 866, 873 (BIA 1968); In re Kojoory, 12 I. & N. Dec. 215, 220 (BIA 1967). The courts, on the other hand, used the harsher "clear probability of persecution standard." See, e.g., Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

2. There Was No Basis for the "Clear Probability of Persecution" Test Inexplicably Adopted by the Courts

The "clear probability of persecution" test used by the courts originated in two 1967 cases. Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968), and Lena v. INS, 379 F.2d 536 (7th Cir. 1967). In Lena, the court reviewed an order of the INS denying a stay of deportation. The court, without citing any authority, set forth the proposition that the Attorney General "restricts favorable exercise of his discretion to cases of clear probability of persecution of the particular individual petitioner." 379 F.2d at 538. In the second case to invoke the "clear probability of persecution" language, Cheng Kai Fu v. INS, the court determined whether three aliens had succeeded in sustaining their burden of showing some likelihood that reopening the proceedings would result in a stay of deportation. The court affirmed

the order of the BIA denying a motion to reopen deportation proceedings. Since the Cheng Kai Fu court was not confronted with the validity of the "clear probability of persecution" test, its mention of the "clear probability" standard -- for which Lena was cited as authority -- was dictum. Nevertheless, these two cases gave rise to an extensive progeny that gives credence to the "clear probability" standard.

3. The BIA and the INS Applied
a "Likelihood of Persecution"
Standard

Unlike the courts, the BIA and the INS consistently applied a standard which they characterize as a "likelihood of persecution." See, e.g., In re Janus and Janek, 12 I. & N. Dec. 866, 873 (BIA 1968); In re Kajoory, 12 I. & N. Dec. 215, 220 (BIA 1967). The "likelihood of persecution" test focuses on the extent to which the alleged fear of persecution is supported by objective facts. The applicant

is required to substantiate his subjective fears with objective evidence. Such evidence could take various forms. For example, previous persecution of the individual alien, or persecution of his family, or evidence of persecution of members of a group or class to which the alien belongs, or evidence of activities engaged in by the alien after he left the country that indicated a likelihood that he would be persecuted if he returned. See In re Janus and Janek, 12 I. & N. Dec. 866 (BIA 1968); In re Salama, 11 I. & N. Dec. 536 (BIA 1966). The courts' "clear probability" phraseology represents a more stringent standard than the BIA's "likelihood of persecution" formulation. But see Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982).

4. The U.N. Protocol Articulated
a "Well-Founded Fear" of
Persecution Test

The U.N. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268, which the U.S.

acceded to in 1968, 19 U.S.T. 6223, sets out a "well-founded fear" as the proper standard to be applied in determining requests for political asylum based on a fear of persecution. The language of the U.N. Protocol is considerably more generous than the "clear probability" test applied by the courts. It approaches the language of what was previously Section 203(a)(7).

The definition of "refugee" adopted in the U.N. Protocol is a person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality.

U.N. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268. This definition of refugee is identical to the definition adopted earlier in the 1951 U.N. Convention Relating to the Status of Refugees, 189 U.N.T.S.

150.^{1/} The internationally accepted definition of refugee, as well as the history of the 1951 Convention's definition of refugee demonstrates that a showing of "good reason" to fear persecution was the threshold that an alien must meet. United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 39 (1950) (E/1618; E/AC 32/5). Hence, although the U.N. Protocol used the "well-founded fear" language, the standard under the U.N. Protocol is essentially synonymous with that of the old Section 203(a)(7). As we have already established, the standard under Section 203(a)(7) was substantially different from the courts' "clear probability" interpretation of Section 243(h). Nevertheless, in In re Dunar, 14 I. & N. Dec. 310 (BIA 1973), the BIA considered whether the "clear probability" and the

1. Although the United States never formally acceded to the Convention itself, this Convention is the basis for the U.N. Protocol to which the United States did accede in 1968.

"well-founded fear" standards were at all distinct. The BIA erroneously concluded that, because a showing of "well-founded fear" demanded objective evidence to substantiate a subjective fear, the two standards were essentially the same.

In 1968, the United States acceded to the U.N. Protocol. Thereafter, given the foregoing conflicting interpretations, it became apparent to legislators that the spirit and the letter of the U.N. Protocol were not being conformed to. It was this concern that prompted the enactment of new legislation that would bring U.S. laws within the confines of the U.N. Protocol.

B. The Legislative History of the
Refugee Act of 1980 Evidences
Congressional Intent to Bring
U.S. Law into Compliance with
the U.N. Protocol

The legislative history of the Refugee Act of 1980 indicates Congress' intent not only to rewrite statutory provisions regarding

political asylum, but to conform American asylum law to the language of the U.N. Protocol. That Congress intended the regulations and procedures relating to political asylum to be changed to conform to the standards of the U.N. Protocol is evident in the Conference Report accompanying the Refugee Act of 1980. It states:

The Senate bill provided for withholding deportation of aliens to countries where they would face persecution The conference adopts the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.

Joint Explanatory Statement of the Committee of Conference, S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980) (emphasis added).

The changes in asylum law embodied in the Refugee Act of 1980 began with the adoption of a uniform definition of "refugee." Congress specifically adopted the definition of refugee accepted under the U.N. Protocol. As is stated in the Conference Report:

The Senate Bill incorporated the internationally-accepted definition of refugee contained in the U.N. Convention and Protocol Relating to the Status of Refugees.

The House amendment incorporated the U.N. definition.

The Conference substitute adopts the House provision.

Id. at 19. As amended, Section 201(a)(42) of the 1980 Act incorporates the newly adopted definition of "refugee." It states:

The term "refugee" means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (1952), as amended by Refugee Act of Mar. 17, 1980, Pub. L. No. 96-212, 94 Stat. 102 (emphasis added).

The statutory changes occasioned by the Refugee Act established as law those changes envisioned when the United States, in 1968,

acceded to the U.N. Protocol.^{2/} This congressional intent is evident from the House Report accompanying the Refugee Act of 1980:

(2) Withholding of Deportation.

Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act. That section currently authorizes the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention.

2. The government argues that accession to the U.N. Protocol in 1968 was premised on the understanding that such action would not substantively alter American immigration laws. The government in its Brief for the Petitioner at 26 relies on the testimony of Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the U.S. Department of State, S. Exec. Rep. No. 14, 90th Cong., 2d Sess. (1968). His assurance that the Attorney General will be able to administer provisions in the Protocol without necessitating amendments to American immigration or asylum law means that, because there was no statutory standard for accepting applicants for political asylum, the U.N. Protocol standard could be administratively adhered to without the need for substantive statutory changes.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979) (emphasis added).

As part of Congress' comprehensive revision of asylum law, Section 243(h) also was substantially amended to conform it to Article 33 of the 1951 Convention. Under the new language the Attorney General no longer was delegated discretionary authority:

The Attorney General shall not deport or return any alien to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act, 8 U.S.C. § 1253(h), as amended by Refugee Act of Mar. 17, 1980, Pub. L. No. 96-212, 94 Stat. 102 (emphasis added).

These substantive changes in asylum law, particularly in Section 243(h), were deemed "necessary so that U.S. law clearly reflects our legal obligations under International agreements." H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979).

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Dated: August 29, 1983

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CLERK.

No. 82-973

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF AMICUS CURIAE OF AMERICAN
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IN SUPPORT OF RESPONDENT**

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 82-973

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

v.

PREDRAG STEVIC

BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENT

INTERESTS OF THE AMICUS CURIAE

The American Immigration Lawyers Association is a nonprofit association of lawyers practicing immigration and nationality law. The Association is supported by the dues paid by its members and is dedicated to the just administration of the immigration laws of the United States. The Association and its members are committed to the development of the jurispru-

dence of immigration law and believe that the views submitted herein while nevertheless in support of the alien's position would present a different view from that which might be advanced by either party.

INTRODUCTION AND SUMMARY OF ARGUMENT

In passing the Refugee Act of 1980 ("1980 Act"),¹ Congress directed that section 243(h) of the Immigration and Nationality Act² ("section 243(h)")³ be applied in conformity with the United Nations Convention Relating to the Status of Refugees ("Convention").⁴ Article 33, as

¹Pub. L. No. 96-212, 94 Stat. 102, et seq.

²("INA"), 8 U.S.C. §1101 et seq. (Supp. V).

³Section 243(h), 8 U.S.C. §1253(h) (1) (Supp. V), provides in pertinent part:

"The Attorney General shall not deport or return any alien...to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

⁴189 U.N.T.S. 150 (July 28, 1951).

incorporated into the United Nations Protocol Relating to the Status of Refugees ("Protocol"),⁵ refers to the term "refugees." That term, as defined in the Protocol, and in the 1980 Act, which tracks its language, relates to persons who have a "well-founded fear of persecution."

Before and after the 1980 Act, the standard of the Board of Immigration Appeals ("Board") for determining eligibility under section 243(h) has been "clear probability" of persecution. As this standard has meant a near certainty of persecution, it is significantly stricter than the "well-founded fear" standard of the Protocol.

In passing the 1980 Act and amending section 243(h), Congress intended to conform United States immigration law to the Protocol. Despite the somewhat inconclu-

⁵19 U.S.T. 6223 (January 31, 1967).

sive legislative history of the 1980 Act, it is beyond doubt that Congress was primarily concerned with conforming Section 243(h) to the substantive requirements of the Protocol. Moreover, Congress intended to merge the standard for 243(h) into the less stringent standard which had for years been applied to refugees under former INA section 203(a)(7) ("section 203(a)(7)").⁶

"Clear probability" is a far stricter standard than "well-founded fear," as interpreted by the United Nations High Commissioner for Refugees ("UNHCR") and by many Western signatories to the Protocol. The failure of the United States to adjust its standard to the Protocol in 1968 required passage of the 1980 Act. The decision below, therefore, correctly interprets Congress' intent to conform section 243(h) to the Protocol.

⁶ 8 U.S.C. §1153(a)(7).

ARGUMENT

IN PASSING THE 1980 ACT, THE UNITED STATES ADOPTED THE "WELL-FOUNDED FEAR" STANDARD OF THE PROTOCOL AND THEREBY CHANGED THE ADMINISTRATIVE STANDARD FOLLOWED BY THE BOARD.

- A. The Board's Administrative Standard Before and After The 1980 Act Has Been "Clear Probability" Of Persecution, Which Has Required A Near Certainty of Persecution.

1. "Clear Probability" requires a near certainty of persecution.

Both before and after the 1980 Act, the Board's standard in determining eligibility for withholding of deportation has been a "clear probability" of persecution.⁷ In applying the "clear probability" standard, the Board has required an

⁷ See, e.g., Marroquin-Marriguez v. INS, 699 F.2d 129, 133 (3d Cir.), petition for cert. pending, No. 82-1649 (filed April 7, 1983); Rejaie v. INS, 691 F.2d 139, 146-47 (3d Cir. 1982); Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir. 1976); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971); Matter of Martinez-Romero, Interim Dec. 2872 at 6 (June 30, 1981), aff'd, Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982); Matter of Rodriguez-Leon, A24-784-669 at 4 (BIA March 13, 1981); Matter of Mercade, A24-715-866 at 4 (BIA

alien to show to a near certainty that he would be persecuted on return to his country.

Under this stringent standard, persecution of virtually all members of a group to which the alien belongs does not constitute "clear probability" of persecution. Matter of Tan, 12 I. & N. Dec. 564 (BIA 1967). In Tan, the Board denied section 243(h) relief to a member of the Chinese ethnic minority in Indonesia, which had been facing severe attacks by the local populace. Despite evidence that the

July 14, 1981); Matter of Mendoza-Merino, A23 212-898 at 4 (BIA May 8, 1981); Matter of Hague, A36-260-428 at 4 (BIA February 5, 1981); Matter of Pang, A15-849-374 at 4 (BIA July 2, 1980); Matter of Maxime, A21-140-801 at 2 (BIA June 11, 1980); Matter of McMullen, 17 I. & N. Dec. 542 (BIA 1980), rev'd, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Matter of Dunar, 14 I. & N. Dec. 310, 318-319, 322 (BIA 1973); Matter of Cha, A14-100-755 at 2 (BIA Dec. 10, 1971); Matter of Cuslac, A19-050-883 at 2 (BIA April 3, 1970); Matter of Bielecki, A13-836-799 at 4 (BIA May 1, 1970); Matter of Joseph, 13 I. & N. Dec. 70, 72-73 (BIA 1968); Matter of Tan, 12 I. & N. Dec. 564, 568 (BIA 1967).

government sanctioned these attacks, the Board held this did not constitute "clear probability" of persecution.⁸

Even an alien's political activities for which he was targeted for execution, were held not to constitute "clear probability" of persecution in Matter of McMullen, 17 I. & N. Dec. 542 (BIA 1980), rev'd, McMullen v. INS, 648 F.2d 1312 (9th Cir. 1981). The alien produced newspaper and magazine articles reporting his defection from the Provisional Irish Republican Army ("PIRA"), background evidence on the PIRA's routine torture and execution of defectors, and the public record in extradition proceedings showing the political nature of his activism.

⁸ Tan produced New York Times articles reporting that the government banned Chinese language newspapers, closed Chinese language schools and created hostility toward the Chinese. The record also included a letter from a relative disclosing that Tan's father's bakery had been broken into during a violent anti-Chinese riot.

The Board denied section 243(h) relief. It held that the alien had not demonstrated "clear probability" of persecution as he had not shown that the Irish government could not control the PIRA, though it conceded that "the Irish government ha[d] not been able to wholly control this [PIRA] terrorism." 17 I. & N. Dec. at 546. The Ninth Circuit reversed, noting that the "clear probability" standard applied by the Board was virtually "impossible" to meet. 658 F.2d at 1319.

The near certainty of persecution required under the "clear probability" standard is also exemplified by Rosa v. INS, 440 F.2d 100 (1st Cir. 1971), where the Board and the First Circuit denied withholding to a Dominican police sergeant under the former Trujillo regime even though the present government would not be able

to protect him from mob violence.⁹

Indeed, the instant case demonstrates the irrational stringency of the "clear probability" standard. Respondent Stevic demonstrated that he has been an active member of Ravna-Gora, an emigre anti-communist organization in the United States. Stevic v. Sava, 678 F.2d 401, 403 (2d Cir. 1982). Mr. Stevic's father-in-law, although then a United States citizen, was imprisoned for three years, when he went to Yugoslavia for a visit, because of his membership in Ravna-Gora, and committed suicide on his release. Stevic produced an Amnesty International Report and statements from the Congressional Record

⁹ In addition to his own testimony, he submitted an affidavit of the Dominican Republic's local Consul General, stating that on the alien's return, he would be imprisoned, his property would be confiscated, and the government could not control mob violence aimed at him. The Board and the First Circuit nevertheless held that this did not constitute a "clear probability" of persecution.

verifying that a "hostile propaganda" law providing criminal penalties, including the imprisonment of violators, is enforced by the Yugoslavian government against members of emigre anticommunist organizations. Petitioner's Brief before the Second Circuit at 1517. Moreover, Stevic, a Serbian, produced evidence showing that the Serbians were being driven from their homes by the Albanian majority in his home province. Id. at 19. The Board denied section 243(h) relief despite the strong showing of: persecution of members of a group to which Mr. Stevic belongs; persecution of members of his family; and political activities in the United States which would result in persecution on his return to Yugoslavia. It was thus effectively demanding a showing of persecution to a near certainty.

2. The Board has required a near certainty of persecution even when it purported to apply a "likelihood" or "well-founded fear" standard.

Even when it has used the terms "likelihood" and "well-founded fear" of persecution to describe the section 243(h) standard, the Board has required proof of persecution to a near certainty. Matter of Kojoory, 12 I. & N. Dec. 215 (BIA 1967); Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968).¹⁰

¹⁰ The Government argues that the standard for section 243(h) relief was "realistic likelihood" of persecution before the courts imposed the "clear probability" standard, citing Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967) and Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). Brief for the Petitioner ("Pet. Br.") at 25. In fact, the courts were simply using the term "clear probability" as an apt characterization of the Board's administrative practice. See Matter of Bugajski, No. A14-133-905 at 3 (BIA March 23, 1966) (characterizing standard as "strong probability"); Matter of Perez, 10 I. & N. Dec. 603, 606 (BIA 1964) (requiring alien to demonstrate "positive" and "conclusive" reasons why he would be persecuted.)

Although prior to Lena and Cheng Kai Fu, the Board did not consistently articulate the standard

In Kojoory, the alien was the president of an anti-Shah student organization while in the United States, an editor of its newspaper and the creator of a highly critical caricature of the Shah. A photograph of Kojoory demonstrating against the Shah was published in a number of newspapers, including The Los Angeles Times. Purporting to apply a "likelihood" standard, the Board refused to withhold his deportation, despite its conclusion that "[t]here is no doubt that respondent has been prominently involved in this [anti-Shah] movement and it seems likely that he is known as a participant by the government of Iran." 12 I. & N. Dec. 215, 217.

it was applying, even when it used other terminology, such as "likelihood" of persecution, it was effectively applying a "clear probability" standard. This is shown by its denial of withholding of deportation under a "likelihood" standard in the cases discussed above where aliens presented compelling evidence that they would be persecuted.

Similarly, in Kasravi v. INS, 400 F.2d 675, 676-77 (9th Cir. 1968), the Board denied withholding of deportation under a "likelihood" standard where the alien's "vociferous and vehement" opposition to the Shah in the United States was made known to the Iranian government by virtue of the publicity he received.¹¹ See also Note, "The Right of Asylum Under United States Law," 80 Col. L. Rev. 1125, 1141, 1142 (1980).

A transparent example of the near certainty test disguised as the "well-founded fear" standard is Matter of Francois, 15 I. & N. Dec. 534 (BIA 1975).

There the alien's father was murdered when the Haitian dictator Duvalier came to power. Their home destroyed, the alien's family fled to the Bahamas. Some of those family members who later returned

¹¹ Compare Matter of Janus and Janek, 12 I. & N. Dec. 866 (BIA 1968) (Board granted section 243(h)

to Haiti were also killed. The Board held that the alien did not have a "well-founded fear" of persecution because he had not demonstrated why the Haitian government "might be interested in him at this time." Id. at 537.

The Government argues that because the Board and the courts have used the terms "clear probability," "likelihood," and "well-founded fear" of persecution to describe the standard for withholding of deportation, the three standards are synonymous. Pet. Br. at 30-32. According to the Government, all three require merely a realistic likelihood of persecution. In support of its contention, the Government asserts that section 243(h) relief will be granted if the alien shows: previous persecution of himself or his family; persecution of all or virtually all members of a group to which he belongs; or activities engaged in after he left his country

relief to alien first critical of communist homeland after entry to United States; See also Lewis, "Case for Asylum," The New York Times, Aug. 25, 1983, p. A23, col. 5.

which will result in persecution if he returns. Pet. Br. 23-24, 32 and n.32. In fact, as appears above, the Board has denied section 243(h) relief despite compelling evidence of these very factors. Regardless of the term used to describe the standard for eligibility for withholding of deportation, the Board has required an applicant for section 243(h) relief to demonstrate to a near certainty that he would be persecuted.

- B. In Amending Section 243(h) In The 1980 Act, Congress Intended To Conform form That Section's Provisions To The Requirements Of The Protocol, Thereby Changing The Standard Of Eligibility.

When Congress passed the 1980 Act, amending the existing provisions of the INA, it did so with the express purpose of conforming the United States statutory law to the relevant provisions of the Protocol.

This purpose was confirmed by the Conference Committee's adoption of the

House version of the amendment to section 243(h) "with the understanding that it is based directly upon the language of the Protocol and [the intention] that the provision be construed consistent with the Protocol," H. R. Rep. No. 781, 97th Cong., 2d Sess. 20 (1980), and more particularly Article 33 of the Convention incorporated therein.¹² Article 33 in turn refers to "refugees," a term defined in both the Protocol¹³ and the INA¹⁴ as persons who have a "well-founded fear of persecution."

¹²See H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979):

"Although this section [243(h)] has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention."

* * *

[T]he proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements."

¹³See Article I(2) of the Protocol and Article I of the Convention.

¹⁴See INA §101(a)(42), 8 U.S.C. §1101(a)(42) (Supp. V).

While conceding congressional intent to conform to the Protocol, the Government asserts that the 1980 Act was designed to maintain the existing standard for section 243(h) relief, arguing that our law already conformed to the requirements of the Protocol. In its view the substantial change in legislative language wrought by the new law was simply a symbol of the United States' commitment to its international obligations and nothing more. This reading of the amended section 243(h) puts an undue strain on its text and history.

The Government's position belittles the clearly expressed legislative intent to bring United States law into conformity with the Protocol. The Government points to statements made by executive branch officials during Senate consideration of our accession to the Protocol to support its assumption that the Senate did not intend to alter the substance of our

immigration laws by accession to the Protocol. See Pet. Br. at 26-27. These officials assured the Senate that no legislative amendments were necessary to meet our obligations under the Protocol, since the Attorney General had the necessary administrative authority to apply existing law in conformity with the Protocol.¹⁵ Thus, what the Senate was led to understand was not that no changes at all were required by our accession, but rather that any changes that were required could be handled administratively. See, for example, Matter of Dunar, 14 I. & N. Dec. 310 (BIA 1973), where the Board observed that the Attorney General had, in the exercise of his administrative discretion, consistently withheld deportation where an alien met the administratively-determined "clear

¹⁵ See S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 6 (1968) (remarks of Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs of the United States Department of

probability of persecution" standard.

Moreover, the Government's references to the legislative history of the 1980 Act again point to statements made by representatives of the executive branch that the Protocol's requirements were already being satisfied under United States law.¹⁶ These officials merely restated the position the Government has maintained in proceedings before the Board and in the courts before and after the enactment of the 1980 Act. While the relevant congressional committees acknowledged the Government's position, it is hardly clear that Congress was satisfied that the requirements of the Protocol had been, and were

State); S. Exec. Doc. K, 90th Cong., 2d Sess. VII (1966) (letter of the Secretary of State).

¹⁶ The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 71 (1979) (remarks of David Martin, Office of the Legal Adviser, Department of State and of Doris Meissner, Deputy Associate Attorney General, Department of Justice).

being met. The modification of section 243(h), specifically to clarify the language and conform it to the Protocol, strongly suggests that Congress was troubled by its vulnerability as applied. In the face of continuing contention before the Board and in the courts,¹⁷ and in the absence of a Supreme Court decision, Congress saw fit to recast the language of 243 (h) in accordance with the requirements of the Protocol. What it accomplished was presumably more than a cosmetic change.

Whatever else may be in doubt, it is clear that Congress significantly altered the language of our laws relating to refugees, not only by changing the language of section 243(h) to conform to the Protocol, but by adding a provision for asylum, as

¹⁷ See, e.g., Kashani v. INS, 547 F.2d 376 (7th Cir. 1977); Matter of Chumitazi, 16 I. & N. Dec. 629 (BIA 1978); Matter of Dunar, 14 I. & N. Dec. 310 (BIA 1973).

well as a definition of refugee conforming almost precisely with that contained in the Protocol. Moreover, given the requirements of the Protocol, the 1980 Act should be construed so as to avoid conflict between this statute and our treaty obligations undertaken by accession to the Protocol. Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804).¹⁸

- C. In Amending Section 243(h), Congress Adopted The Less Stringent Standard Applied By The Board Under Former Section 203(a)(7).

There is yet another basis for finding that Congress intended the 1980 Act to accomplish an easing of the "clear probability" standard in 243(h) cases. This relates to the relationship of the new legislation to an earlier provision under which the Board clearly applied a standard

¹⁸ See also United States v. White, 508 F.2d 453 (8th Cir. 1974); Sociedad Nacional de Marineros de Honduras v. McCulloch, 201 F.Supp. 82, 89 (D.D. C. 1967), aff'd, 372 U.S. 10 (1967).

of eligibility far less demanding than "clear probability."

Under former section 203(a)(7), visa numbers were made available to aliens who fled communist or Middle Eastern countries because of fear of persecution. As the Second Circuit noted below, the standard of eligibility under that provision was less stringent than for withholding of deportation under section 243(h). Stevic v. Sava, 678 F.2d 401, 405, citing Matter of Ugricic, 14 I. & N. Dec. 384 (Dist. Dir. 1972) and Matter of Tan, 12 I. & N. Dec. 564 (BIA 1967).

In Ugricic, the Board held the section 203(a)(7) standard to be "good reason to fear persecution." 14 I. & N. Dec. at 385-386. In Tan, the Board rejected the "argument that an alien deportee is required to do no more than meet the standard under section 203(a)(7) of the Act when seeking relief under section

243(h)." Id. at 569-570.¹⁹ Accord,
Matter of Frisch, 12 I. & N. Dec. 40, 42
 (Reg. Comm. 1967); Matter of Janus and
Janek, 12 I. & N. Dec. 866, 875-76. (BIA
 1968).²⁰

¹⁹ The Government asserts that Matter of Tan
 is inapposite because it focused on the
 Attorney General's discretionary authority. Pet.
 Br. at 43-44. To the contrary, the Board's deci-
 sion did not rely on the Attorney General's dis-
 cretion, but on the difference between former
 section 203(a) (7)'s requirement that an alien de-
 monstrate "fear of persecution" and section 243
 (h)'s requirement that he show that he "would be
 subject to persecution." The Board recognized
 that the latter was much stricter than the former.

²⁰

As section 203(a) (7) provided for conditional
 entry for an alien who both fled his homeland and
 was unable or unwilling to return because of fear
 of persecution, the Government makes the creative
 but baseless argument that the standard for un-
 willingness to return because of persecution is
 stricter than the standard for flight because of
 persecution. Pet. Br. at 43-44. As the cases
 above demonstrate, in all but the one case the
 Government cites, Ishak v. District Director, 432
 F. Supp. 624 (N.D. Ill. 1977), the Board has
 applied the same standard to an alien's flight
 from and unwillingness to return to his country.
 The district court in Ishak obviously did not un-
 derstand the difference between refugee status
 under former section 203(a) (7) and withholding of
 deportation under section 243(h), as highlighted
 by its reliance solely on cases decided under
 section 243(h). 432 F. Supp. at 625.

Section 203(a)(7), then the only provision in the INA for refugees, was succeeded by section 207 of the 1980 Act, 8 U.S.C. §1157 (Supp. V). That provision, like the 1980 Act's asylum provision section 208, 8 U.S.C. §1158 (Supp. V), relies on the term "refugee," defined as one who has a "well-founded" fear of persecution." See INA §101(a)(42). Hence, as the Second Circuit stated, the 1980 Act "dictates that a uniform test of 'refugee' be applied to all aliens, whether seeking admission under the newly enacted section 207, or seeking to avoid deportation under section 243(h)" Stevic v. Sava, 678 F.2d 401, 408. Given the ameliorative purpose of the 1980 Act, Congress hardly could have intended the standard for refugee (or asylum) relief under the 1980 Act to be less generous than its predecessor.²¹

²¹ The Government contends that even if the standard under section 207 of the 1980 Act is more stringent

Indeed, Congress' broadening of the geographic scope of former section 203(a)(7) reveals its expansion of that standard.

H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 1979.²² As the Second Circuit wrote, "it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than existed in prior law." 678 F.2d at 408.

than the standard for refugee status under former section 203(a)(7), that result is justified by the fact that only a minority of refugees who entered the United States prior to 1980 were conditional entrants under section 203(a)(7). Pet. Br. at 44-45. This argument is a non sequitur, as the number of refugees granted section 203(a)(7) relief is totally irrelevant to the standard applied for eligibility under that provision.

²²The Government argues that Congress, in replacing former section 203(a)(7) with the Protocol's uniform definition of refugee, intended merely to eliminate that section's geographical restrictions, but did not intend to retain the less stringent standard for eligibility for refugee status. Pet. Br. at 45-46. That argument overlooks Congress' clear mandate to conform the 1980 Act's definition of refugee to that of the Protocol.

If the Court finds that the 1980 Act did not change the standard for section 243(h), it should limit its decision to that specific issue, on which certiorari was granted, and should refrain from deciding the standard for asylum under section 208. The Court might then wish to remand this case for a consideration of whether respondent Stevic would be eligible for asylum under section 208. Stevic applied for political asylum to the Chicago District Director in June 1979 under 8 C.F.R. §108, the precursor of the current asylum provision, section 208. While the record does not reflect that the application was renewed under the 1980 Act, there has been considerable confusion in reference to the term "asylum," often used interchangeably for "withholding."²³ See, e.g.

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The Government argues that the standards for asylum and withholding of deportation are the same, notwithstanding that asylum is discretionary and withholding of deportation is mandatory to eligible

Rejaie v. INS, 691 F.2d 139, 140-142 (3d Cir. 1982); Pierre v. United States, 547 F.2d 1281, 1289 (5th Cir. 1977), vacated and remanded on other grounds, 434 U.S. 962 (1977).²⁴

applicants. Pet. Br. at 21, n.21. However, the cases that the Government cites confuse asylum and withholding of deportation. See Matter of Martinez-Romero, Interim Dec. No. 2872 (BIA 1981), aff'd, Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982); Matter of Lam, Interim Dec. No. 2857 at 45 (BIA 1981); Matter of McMullen, 17 I. & N. Dec. 542, 544 (BIA 1980), rev'd, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981).

Moreover, as asylum is discretionary, it can be denied to applicants for any number of reasons, such as making entry on forged documents. Matter of Salim, Interim Dec. 2922 at 78 (BIA 1982). As the adjudicator can weigh other factors in deciding whether to grant asylum, a more relaxed standard of eligibility is appropriate. On the other hand, withholding of deportation is mandatory and must be granted to an eligible applicant regardless of negative factors which might weigh against him on an asylum adjudication.

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This relief would be consistent with the Board's broad remand powers. See, e.g., Matter of Martinez-Solis, 14 I. & N. Dec. 93 (BIA 1972); Finucane, "Procedure Before the Board of Immigration Appeals," 31 Interpreter Releases 30 (1954).

It would also be appropriate to remand this case for the determination and application of an evidentiary burden or proof consistent with the requirements of the Protocol and the 1980 Act. See, infra, page 35, n.34.

- D. As Interpreted and Applied in International Practice, "Well-Founded Fear" Is A Less Stringent Standard Than "Clear Probability" As Applied By The Government.

The term "well-founded fear" in the 1980 Act is derived directly from the Protocol.²⁵ It is useful therefore to examine the development of that term in the Protocol and the antecedent Convention and to follow its application in international practice.

1. The 1951 Convention and its 1967 Protocol.

The Convention, adopted in 1951 as the first step in resolving refugee problems arising from World War II, defines a refugee as a person who:

[a]s a result of events occurring before January 1, 1951, and owing to

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H.R. Rep. No. 781, 96th Cong., 2d Sess. 19 (1980).

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country....

Article I(A)(2) (emphasis added).

To extend coverage of the Convention to refugees suffering from events which occurred later than 1951, the General Assembly presented the Protocol for adoption. The Protocol, which entered into force on October 4, 1967, was drafted under the auspices of the United Nations High Commissioner for Refugees (hereinafter "the UNHCR").²⁶ The Protocol re-

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The Office of the United Nations High Commissioner for Refugees was established, pursuant to a decision of the General Assembly, in December 1950. The Office's Statute is annexed to G.A. Resolution 428(V) [December 14, 1950]. The Statute calls for the UNHCR to inter alia, provide international protection, under the auspices of the United Nations, to refugees falling within the competence of his Office.

adopted "well-founded fear" as the standard for determining refugee status, and incorporated by reference most of the other articles of the Convention, including Article 32 and 33. Article 32 prohibits the deportation of refugees lawfully within the territory of a party to the Protocol, while Article 33 enjoins State parties from returning a person who meets the refugee definition to a country where he may be persecuted, regardless of the lawfulness of his presence in the country of refuge. This Article corresponds directly to section 243(h) of the INA. See, supra, pages 2-3, 15-16.

2. "Well-Founded Fear" In International Practice is Less Stringent Than "Clear Probability."

To the extent that there is a doubt as to the meaning of this treaty term, it is appropriate to look to the interpretations and practice of the parties to the treaty, Pigeon River Improvement Slide &

Boom Co. v. Cox, 291 U.S. 138 (1934),²⁷ and the intention of those who actually drafted the term, Cook v. United States, 288 U.S. 102 (1933).²⁸ Under either of these tests, "well-founded fear" means good reason to fear, a standard significantly less stringent than "clear probability."

- a. The interpretation of the Convention's drafters and the UNHCR.

Under the meaning given to "well-founded fear" by the drafters of the Convention, an applicant can qualify if he "can show a good reason why he fears persecution."²⁹ The drafters and signers of

²⁷ See also United States v. Decker, 600 F.2d 733, 739-40 (9th Cir.), cert. denied, 414 U.S. 855 (1979).

²⁸ See also Day v. Trans World Airlines, Inc., 393 F. Supp. 217, 220 (S.D.N.Y. 1975), aff'd, 528 F.2d 31, 34 (2d Cir. 1975), cert. denied, 429 U.S. 890, reh'g denied, 429 U.S. 1124 (1977); Block v. Compaigne Nationale Air France, 386 F.2d 323, 336-7 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).

²⁹ Report of the Ad Hoc Committee on Statelessness

the Convention looked to the UNHCR to oversee the application of the Convention's terms.³⁰ The UNHCR, accordingly, has published the Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979) ("Handbook"), to assist parties to comply with their treaty obligations under the Convention and the Protocol. The Handbook is generally accepted as the authoritative interpretation of the Convention and Protocol. In-

and Related Problems to the Economic and Social Council, U.N. Doc. E/AC.32/5, p. 39 (emphasis added). Note the similarity of the Committee's explanatory language - "good reason why he fears," - to the standard applied under former section 203(a) (7) in Matter of Ugricic, 14 I. & N. Dec. 384, 385-86 (Dist. Dir. 1972). The Government itself has recognized the difference between "good reason to fear" and "clear probability." See, supra, pages 22-23.

³⁰ The Convention's preamble specifically states: "Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the effective coordination of measures taken to deal with this problem will depend upon the cooperation of States with the High Commissioner..." Article 35 of the Convention provides in relevant part:

deed, since the passage of the 1980 Act the Board has repeatedly turned to the Handbook for guidance in determining whether an alien is entitled to treatment as a refugee under the Protocol and section 243(h).³¹

In defining "well-founded fear," the Handbook states:

Since fear is subjective, the definition involves a subjective element in the person applying for refugee status us. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.

1. The Contracting States undertake to cooperate with the Office of United Nations High Commissioner for Refugees,...in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. (emphasis added).

This Article appears, verbatim, in Article 2 of the Protocol.

³¹See Matter of Frentescu, Interim Dec. 2906 (BIA 1982); Matter of Rodriguez-Palma, 17 I. & N. Dec. 465 (BIA 1980); Matter of Giralt, A24-963-058 (BIA September 30, 1982); Matter of Piedra, A22-800-673 (BIA September 30, 1980).

Handbook, para. 37, p. 11 (emphasis added.)³² Although an applicant for refugee status must present some objective evidence which validates his fear, he need not demonstrate that he will be persecuted in his country of origin or even that there is a clear probability of such persecution. Instead a potential refugee need only show that he has a fear of persecution which is reasonable in light of all relevant factors:

[T]he applicant's fear should be considered to be well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

Handbook, para. 42, pp. 12-13 (emphasis added).³³

³² See also Handbook, para. 40, p.12: "An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions."

³³ One leading commentator has defined the appli-

The Board's requirement of "clear probability", i.e. a near certainty, of persecution goes well beyond the requirements envisaged by the drafters of the Convention and understood by the UNHCR.³⁴

cant's burden in the following manner: "The real test is the assessment of the likelihood of the applicant's becoming a victim or persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason enough, and his fear is "well-founded." Grahl-Madsen, The Status of Refugees in International Law, Vol. I, p. 181 (1966) (emphasis added).

If the Board had applied the well-founded fear standard as defined by the UNHCR, it would undoubtedly have reached different results in many cases. See, e.g., Matter of McMullen, 17 I. & N. Dec. 542 (BIA 1980), rev'd, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Matter of Francois, 15 I. & N. Dec. 534 (BIA 1975); Rosa v. INS, 440 F. 2d 100 (1st Cir. 1971). See supra, pages 7-9, 13-14, for a discussion of the compelling facts of these cases.

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The Handbook, in addition to elucidating the standard an applicant for refugee status must meet also addresses the question of the burden of proof. Recognizing that generally the burden of proof rests with the person making the claim, the UNHCR notes that in most cases an applicant will not be able to produce voluminous evidence in support of his claim and may be unable to corroborate important assertions. Handbook, para. 196, p.47. In such cases, an applicant who has made a good faith attempt to produce the evidence at his dis-

- b. The practice of other states party to the Convention and Protocol.

The Board's interpretation of "well-founded fear" also is stricter than the standard applied generally by other parties to either the Convention or Protocol, including many Western nations that share the United States' basic commitment to the

disposal should be given "the benefit of the doubt." Handbook, para. 203, p.48.

This approach contrasts sharply with the burden of proof imposed by the Government. As set forth in Matter of Tan, 12 I. & N. Dec. 564 (BIA 1969), an alien must prove by a preponderance of the evidence that he faces a clear probability of persecution in his country of origin. Moreover, while the Handbook specifically validates grants of refugee status where all that is available to the decision maker is the applicant's own uncorroborated testimony, Handbook, para. 196, p. 47, courts in this country refuse to consider such testimony as sufficient. See, e.g., Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971). Thus, the Government and the courts are out of step with the UNHCR on both the meaning of "well-founded fear" and the proper burden of proof.

On the other hand, whereas in Matter of Tan, a formal distinction between the burden of proof and the standard of persecution was made, in most cases, the Board has failed to distinguish them. An examination of the Board's decisions in the instant case demonstrates this lack of distinction.

humane treatment of refugees.

For example, West German courts have consistently concluded that an applicant for refugee status must show a good reason to fear persecution.³⁵ In 1962, the Federal Administrative Court of Berlin explained that:

Good reasons for fear of persecution in the sense of the Convention exist if, taking a reasonable view of that case, it cannot be expected of the refugee that he remain in his homeland.³⁶

Accordingly, it would be appropriate for this Court to remand the instant case to the Board for the formulation and application of a burden of proof consistent with our obligations under the Protocol.

³⁵ See, e.g., Algerian Refugee Case, AV 10(1962/63) 24, Lauterpacht, 40 I.L.R. 230, 231. See also Matter of Urgricic, 14 I. & N. Dec. 384, 385-86 (Dist. Dir. 1972).

³⁶ Yugoslav Refugee Case, B Verw G I C 41.60, VGH Nr. 133 VIII 59 (1962), Lauterpacht, 40 I.L.R. 202 (emphasis supplied).

Indeed, German courts have characterized the test to be met by asylum claimants as one of only likelihood, rather than probability, of persecution.³⁷

37

For example, in a major case concerning a person's claim to refugee status arising after her departure from her country of origin, the Federal Supreme Court held that such a claim could be established where the applicant produced "evidence that his [sic] country is persecuting people of the same race, nationality or political opinion." Refugie Sur Place Case, Fontes Iuris Gentium, Series A, Sectio II, Tomus 6, 124; RZW 1966, 368, Lauterpacht, 57 I.L.R. 324. Significantly, the German Court did not require proof that virtually all members of the class of persons to which the applicant allegedly belongs are being persecuted.

Contrast this approach with the Government's position. Pet. Brief at 32. n.32. It states flatly that in the absence of proof that an alien would be singled out for persecution upon his return, the alien would have to show inter alia, "that all or virtually all of the members of a group to which he belonged had been persecuted...." See, e.g., Matter of Salama, 11 I. & N. Dec. 536 (BIA 1966). What the Government would require is a near certainty of persecution, a harsh standard never contemplated by the Protocol.

Canada, too, has adopted a refugee standard in accordance with the UNHCR Handbook.³⁸ Recent ministerial instructions and guidelines, issued to supplement the guidance of the Handbook provide:³⁹

A well-founded fear may be based on what has happened to others in similar circumstances. Where a person has not been persecuted simply because he has not yet come to the attention of the authorities, he need not wait until he has been detected and persecuted before he can claim refugee status. Nor need he be under the threat of imminent persecution.

Several states go even further in recognizing the UNHCR's primacy in interpre-

38

1976 Immigration Act, S.C. 1976-77, Chap. 52, Article 2(1). See Maldonado v. Minister of Employment and Immigration, 31 N.R. 34 (1979) where the Federal Court of Appeals reversed the decision of the Immigration Appeals Board and remanded for consideration of whether the applicant had shown a "well-founded fear."

39

Minister of Employment and Immigration, New Refugee Status Advisory Guidelines on Refugee Definitions and Assessment of Credibility (February 20, 1982), para. 4, p. 2.

ting and applying the terms of the Convention and Protocol. Belgium, for example, delegates the responsibility of determining who is a refugee to the UNHCR's representative in Brussels.⁴⁰ The decision of the UNHCR is directly effective in Belgian law. Similarly, France accords the UNHCR's interpretation great weight by allowing his representative to be a voting member of the three-person appellate body reviewing refugee claims.⁴¹

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Ministerial Decree of February 22, 1954, Moniteur, April 15, 1954; Article 2 of the Law of February 27, 1969, Moniteur, May 3, 1969.

41

See Grahl-Madsen, op cit., at 345. The United Kingdom also recognizes the important role of the UNHCR in refugee determinations by allowing the UNHCR's representative to appear as a party in any appeal involving a determination of refugee status. See, e.g., Atibo v. Immigration Officer, [1978] Imm. A.R. 93; Secretary of State v. "Two Citizens of Chile," [1977] Imm. A.R. 36.

The United States appears to be alone among leading Western signatories to the Convention and Protocol in ignoring the interpretation of "well-founded fear" reflected in the Handbook. The "clear probability" test distorts the meaning of "well-founded fear" and violates both the letter and the spirit of the Protocol. Because of the limited nature of section 243(h) relief -- temporary withholding of deportation, rather than eligibility for permanent resident status -- and the possible life-threatening consequences of an erroneous decision, to use a test as stringent as "clear probability" is especially egregious.

CONCLUSION

The judgment of the court of appeals should be affirmed and the case remanded to the Board for a reconsideration of respondent's application for withholding of

deportation under standards which comply with the requirements of the Protocol and the 1980 Act. Alternatively, this case should be remanded to allow respondent to process an application for asylum under section 208.

Respectfully submitted,

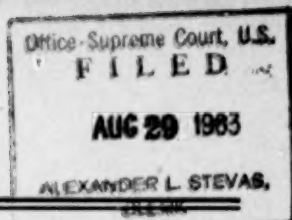
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August 26, 1983

No. 82-973



IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

—against—

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*
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v

No. 82-973

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

-against-

PREDRAG STEVIC

PRELIMINARY STATEMENT

This brief is offered by
the American Jewish Committee, the
International Institute of Boston, and
Members of Congress Walter E. Fauntroy,
Major R. Owens and Ed Towns.

The American Jewish Committee, a national organization of approximately 50,000 members, is dedicated to the defense of the civil rights and religious liberties of American Jews. The Committee believes that this goal can best be accomplished by helping to preserve the human rights of all persons. Since its founding in 1906, the American Jewish Committee has maintained a deep and abiding interest in the development of our nation's immigration and refugee policies. Ever mindful of our inability during the 1930's to make our immigration laws more flexible and responsive in order to rescue the untold millions trapped in Europe when war broke out, many of whom later died in Hitler's death camps, the Committee is committed to fundamental humanitarian principle that the United States should play a key role

in providing, together with other free nations, a safe haven for the world's oppressed. The American Jewish Committee has consistently urged a generous immigration policy and resisted all attempts to restrict the definition of a refugee.

The International Institute of Boston is a non-profit, non-sectarian agency providing social services for the limited English speaking and foreign born. The Immigration Legal Department of the Institute provides free or low cost immigration counseling and representation to low income persons. The Legal Department of the Institute has represented over 100 applicants for political asylum in the United States.

Messrs. Fauntroy, Owens, and Towns are members of the House of

Representatives who have an expressed interest in the equitable adjudication of refugee and asylum claims by the United States Government. They are particularly concerned about the position of the Immigration and Naturalization Service on the refugee standard in this matter because they believe that that position contravenes the legislative intent of the Refugee Act of 1980. They believe further that if the INS' interpretation is upheld, it will exacerbate unjust denials of asylum seekers such as Haitians, Salvadorans, Ethiopians and others.

The parties have consented in writing to the submission of this brief.

SUMMARY OF ARGUMENT

The Refugee Act of 1980 sets forth a uniform, non-ideological eligibility standard for refugee status compatible with the humanitarian traditions and international obligations of the United States.

Under the standard, a refugee must establish that he or she was persecuted or has a "well-founded fear of persecution" in his or her home country. This standard differs substantially from the previous standard for withholding of deportation under the Immigration and Nationality Act of 1952, which was interpreted to require an alien to show a "clear probability of persecution."

Petitioner's adherence to the "clear probability" standard violates the Refugee Act of 1980.

THE REFUGEE ACT OF 1980 SETS FORTH
A UNIFORM, NON-IDEOLOGICAL
ELIGIBILITY STANDARD
FOR REFUGEE STATUS

A. The Standard under the Act.

The Refugee Act of 1980^{1/} established a standard for uniform and non-ideological refugee eligibility. Congress intended this new standard to be compatible with the humanitarian traditions and international obligations of the United States. Central to the Act was a statutory definition of "refugee" which conformed to that of the 1967 United Nations Protocol Relating to the Status of Refugees.^{2/} A refugee was defined as

^{1/} Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter the 1980 Act].

^{2/} The United States became a party to the Protocol in 1968. 19 U.S.T. 6223; T.I.A.S. No. 6577.

... any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....

Section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a) (42) (1982). This standard is used to determine claims for asylum under Section 208(a) of the Act, 8 U.S.C. § 1158(a) (1982), and claims for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. § 1253(h) (1982).^{3/}

^{3/} See 8 C.F.R. § 208.3 (1983) [asylum requests "shall also be considered as requests for withholding exclusion or deportation pursuant to Section 243(h) of the Act"].

It is beyond dispute that Congress intended the definition of "refugee" in the 1980 Act to conform to that in the Protocol. See, e.g., 126 Cong. Rec. 3,757 (1980) [Statement of Senator Kennedy: "The new definition makes our law conform to the United Nations Convention and Protocol. . . ."]. During hearings, the derivation of the term was often mentioned and never questioned. This intent was emphasized in the report of the Senate Judiciary Committee and debate on the Senate floor. S. Rep. 256, 96th Cong., 1st Sess. (July 23, 1979), 125 Cong. Rec. 23,231 (1979).

Similarly, throughout House consideration of the bill, references were made to "the fundamental change under the legislation. . .the replacing of

the existing definition of refugee with the definition which appears in the U.N. Convention and Protocol. . . ." Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess., 27 (1979) [hereinafter 1979 House Hearings]; see also id. at 43, 168, 169, 248, 251, 280, 284, 291, 357, 361, 383, 393; 125 Cong. Rec. 35,813-26 (1979).

The purpose of changing the definition was not only to excise ideological bias from immigration law, but also to "facilitate bringing refugees into this country," since only a well-founded fear of persecution would have to be established. 1979 House Hearings, supra, at 169 and 284; Briefing on the Growing Refugee Problem, Hearing Before the Sub-

comm. on International Organizations of
the Comm. on Foreign Affairs, 96th Cong.,
1st Sess., 4-5 (1979).

- B. The inquiry under the new "well-founded fear" standard differs substantially from that under the prior "clear probability" standard.

The "well-founded fear" standard under the Refugee Act differs significantly from the previous standard used to evaluate withholding of deportation claims. Under the previous standard, the INS had developed a limiting "policy restricting the favorable exercise 'of discretion to cases of clear probability of persecution of the particular individual petitioner'." In re Joseph, 13 I&N Dec. 70, 72 (1968) [citation ommitted]; In re Tan, 12 I&N Dec. 564, 568 (1967); Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967).

"Clear probability," moreover, is a stringent standard.^{4/} See, e.g., In re Tan, 12 I&N Dec. 564 (1967) [voluminous documentation of abuse of ethnic Chinese in Indonesia, letters from relatives and an attack on the family business insufficient evidence]. See also Haitian Refugee Center v. Civiletti, 503

^{4/} It is misleading to assert (Petitioner's Brief at 25) that the Second Circuit "attributed a stringency to the phrase "clear probability" that is inconsistent with [its] own observations in Cheng Kai Fu v. INS," 386 F.2d 750 (2d Cir.), cert. denied 390 U.S. 1003 (1967). Cheng concerned the rejection of a motion to reopen deportation proceedings, and in deciding that the applicant had failed to show even "some evidence" of potential persecution, the court did not hold that "some evidence" would satisfy the burden of showing a "clear probability" of persecution.

F. Supp. 442 (S.D. Fla. 1980), modified,
sub nom. Haitian Refugee Center v.
Smith, 676 F.2d 102 (5th Cir. 1982). In
that case, the district court found evi-
dence of systematic and extensive perse-
cution by the Haitian government in the
cases reviewed, yet not one asylum claim
had been found by INS to meet the "clear
probability" standard. One woman's
father had been killed by the Ton Ton Ma-
coutes who had come for her just after
she had fled. Another had been jailed af-
ter the murder of both her husband and
her son. 503 F. Supp. at 474-510.

In contrast to the "clear
probability" standard, the "well-founded
fear" standard introduces to the inquiry
the character and state of mind of the
individual applicant. See Handbook on
Procedures and Criteria for Determining

Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva 1979) (herein-
after Handbook) at 11-13, ¶¶ 37-41, 45.^{5/}
Fear must be reasonable under the circum-
stances. However, even "[e]xaggerated
fear . . . may be well-founded" if the
applicant's interpretation of the
situation, given his background, is
reasonable. Handbook at 12, ¶ 41.

^{5/} The Second Circuit referred below to the United Nations High Commissioners' Handbook as a distillation of the "High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject." Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982). The Board of Immigration Appeals has itself treated the Handbook as a significant source of guidance as to the meaning of the Protocol. In re Frentescu, Int. Dec. No. 2906 at 4 (BIA June 23, 1982); In re Rodriguez Palma, 17 I&N Dec. 465 (BIA 1980). The pertinent provisions of the Handbook appear in an appendix submitted herewith.

Generally a claimant's fear will also have external indicia. Under the Protocol standard, circumstantial evidence is relevant and admissible, to be evaluated in terms of "the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences" Handbook at 12, ¶ 41 [emphasis supplied].

Thus, under the "well-founded fear" standard, "[d]etermination of refugee status will. . . primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin."

Handbook at 11, ¶ 37. The conditions in the country in question may be relevant as external confirming evidence of the applicant's fear.

C. Adherence to the "clear probability" standard violates the Refugee Act.

Courts have long recognized a "need for special judicial deference to congressional policy choices in the immigration context." Fiallo v. Bell, 430 U.S. 787, 793 (1977). This principle requires respect for legislative intent. "By contrast, the power of the INS is more circumscribed ... [and it] must conform its actions to the statute" Haitian Refugee Center v. Civiletti, 503 F. Supp. at 452.

The Court should reject administrative constructions that are in-

consistent with the mandate of Congress or that frustrate the policy that Congress sought to implement. S.E.C. v. Sloan, 436 U.S. 103, 118 (1978); see also, Morton v. Ruiz, 415 U.S. 199, 237 (1974). The Court should thus require the administrative authorities to "honor the clear meaning of a statute as revealed by its language, purpose and history." International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979). A fair reading of the legislative history shows that the 1980 Refugee Act was designed to adopt the Protocol's "well-founded fear" standard. The Act must be followed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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August 1983

APPENDIX

Handbook on Procedures and Criteria for
Determining Refugee Status

37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.

38. To the element of fear--a state of mind and a subjective condition--is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted"--for the reasons stated--by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

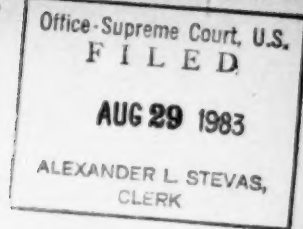
40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective

element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences--in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

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BRIEF OF AMNESTY INTERNATIONAL USA,
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8 U.S.C. §110(a)(42)	Passim
8 U.S.C. §1153(a)(7)	Passim
8 U.S.C. §1253(h)	Passim
Refugee Act of 1980, P.L. 96-212, 94 Stat. 102 et seq.	Passim
<u>Miscellaneous</u>	
Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979)	Passim
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Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commis- sioner for Refugees, 1982 Mich. Yearbook of Int'l. Legal Studies 291	21

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO 82-873

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTEREST OF AMICUS CURIAE

Amnesty International USA ("AIUSA")
is one of over 40 national sections of
Amnesty International ("AI"), a world-
wide human rights organization with over
3,000 local groups and over 500,000
members, subscribers and supporters in
over 150 countries and territories

around the the world. AI and AIUSA are independent of any government, political grouping, ideology, economic interest or religious creed. AI and AIUSA work to obtain the release of prisoners of conscience -- men and women detained anywhere for their beliefs, color, sex, ethnic origin, language or religion, provided they have not used or advocated violence. In 1977 AI received the Nobel Peace Prize for its human rights work.

AI and AIUSA have a direct interest in the status of refugees around the globe. Refugees who are returned to countries in which there is reason to believe they may be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion may become tomorrow's prisoners of conscience. AIUSA urges this Court to decide that

the "clear probability" test applied by the INS over the years has been superseded by the international "well founded fear of persecution" standard embodied in Article 33 of the Convention, on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention") as it has been incorporated in the United Nations Protocol relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No 6577 ("Protocol"), and in the Refugee Act of 1980, P. L. No 96-212, 94 Stat. 102 et seq ("Refugee Act").

AIUSA participated in the legislative process which led to the passage of the Refugee Act of 1980 and it urges this Court to reject the Government's contention that the incorporation of the international principle of "non-refoulement" in the Refugee Act of 1980 was

merely a public relations gesture without domestic effect. The long legislative process which led to the passage of the Refugee Act of 1980 was not animated by such cynical motivations. The legislative record is replete with the congressional intent to bring United States immigration law into conformity with our international obligations.

AIUSA has played a supportive role in the litigation of "non-refoulement" and asylum claims in administrative and court proceedings throughout the United States. Although AIUSA is seldom able to express an opinion about the validity of a particular applicant's fear of persecution, it has provided research materials concerning the human rights situation in various countries in the world which have been used by the INS and the courts in evaluating such claims.

See, e.g., Fernandez-Roque v. Smith, 539 F.Supp. 925 (N.D. Ga 1982); Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977).

AI materials are prepared by AI's International Secretariat in London which examines and reports on human rights conditions in all countries. In the case of Yugoslavia AI prepared various materials relied on by the respondent in the proceeding below. Moreover, in 1982 AI published a 44 page report concerning prisoners of conscience in Yugoslavia which contains information directly relevant to respondent's claim that he fears persecution because of his political views if he returns to Yugoslavia.

These materials provide ample support for Respondents' fear that he will be persecuted if he is returned to

Yugoslavia, which is all the principle of "non-refoulement" requires.

INTRODUCTION AND SUMMARY OF ARGUMENT

The complicated procedural history of the proceedings below is not at issue in this Court. The sole question presented is whether the Refugee Act modified the standard an alien must meet in order to avoid deportation on the ground that he fears persecution in the country of deportation. More precisely, the issue of whether an alien claiming a "well-founded fear of persecution" must prove based on objective evidence that there is a near certainty that he "would be" persecuted or whether it is sufficient that an alien demonstrate that his subjective fear of persecution is supported by some objective evidence which

is sufficient to show that his fears are "well-founded."

The resolution of this issue is not a matter of semantics. This Court's decision will have a dramatic impact on aliens seeking relief from deportation or asylum and on United States compliance with its international obligations. If the INS position is accepted, it will continue to be difficult for aliens to obtain relief from deportation unless they can prove by objective evidence that there is a prison cell or a bullet reserved for them in the receiving country. If the Second Circuit's decision is affirmed the INS will be forced to assess realistically the charges that an alien may be persecuted and to implement the principle of "non-refoulement" in all appropriate cases. This case is a good example of the practical signifi-

cance of the different standards.

The respondent alleged that he feared persecution if he was returned to Yugoslavia because of his close affiliation with Ravna Gora--an anti-communist emigre organization active in the Chicago area where respondent has resided during his period of residence in the United States. Respondent supported this claim with documentary evidence of his affiliation with Ravna Gora and with newspaper clippings concerning conditions in Yugoslavia. He also relied on the fact that his father-in-law had been imprisoned for his anti-communist activities when he visited Yugoslavia in 1974 as a tourist, even though he was an American citizen. Later in the proceedings respondent submitted additional materials, including AI reports on conditions in Yugoslavia, and affidavits of indivi-

dual Yugoslavs who testified that respondent would be imprisoned if he were returned to Yugoslavia.¹ The above evidence was rejected by the Board of Immigration Appeals because the articles submitted by respondent, including AI materials, were "of a general nature, referring to political conditions in Yugoslavia, but not specifically relating to the respondent" and because the affidavits and petitions submitted by individual Yugoslavs "express an opinion [that respondent will be imprisoned if he returns to Yugoslavia] but provide no direct evidence to link the respondent's activities in this country and the probability of his persecution in

1. It must be emphasized that the issue of whether respondent should have filed for asylum or relief from deportation or should have introduced the above materials at an earlier time in the proceedings is not at issue before this Court.

Yugoslavia." INS Brief, at 5-6.

Amicus submits that this decision is merely a euphemism for the Petitioners' position that it has absolute discretion to deny the right of "non-refoulement" to any alien. The international principle of "non-refoulement" was meant to apply equally to all applicants for refugee status. Few refugees can meet the nearly impossible standard described by the Board and implemented by the INS in countless cases. There is no Freedom of Information Act in Yugoslavia which respondent might have invoked to support his claim. Only his imprisonment upon his return to Yugoslavia would satisfy the INS standard, but, of course, by then it would be too late. At that point, respondent is more likely to be an AI prisoner of conscience and of no concern to the INS.

The AI materials relied upon by respondent in the proceedings below demonstrate how "well-founded" respondent's fear of persecution is, notwithstanding the INS decision to the contrary.² Persecution in Yugoslavia on account of political beliefs contrary to official government positions is conducted based upon an elaborate legislative scheme of political repression.³ In particular Article 133 of the Federal Criminal Code prohibits "Hostile Propaganda" in terms so broad that respondent's

2. The following discussion is based upon a 1982 AI report entitled "Yugoslavia: Prisoners of Conscience" ("AI report") which incorporates most of the AI information relied upon by respondent in the proceedings below.

3. The repressive legislation in Yugoslavia is also outlined in the State Department's annual human rights country reports which are in part based upon the AI reports relied upon by respondent in the proceedings below. See, e.g., the February 2, 1981 report, at 925-929.

activities with Ravna Gora seem to fall squarely within this expansive net.⁴

Other legislation prohibits "counter-revolutionary endangering of the social order," "endangering the traditional unity" and "association for the purpose of hostile activity." AI Report, at 16-21.

The "hostile activity" law is perhaps the most serious threat to respondent if he is returned to Yugoslavia. Article 131 of the Criminal Code provides that:

"A Yugoslav national who with intent of engaging in hostile activitiy against his country enters into contact with a foreign or refugee organization or group of persons, or aids them in performance of hostile activities shall be punished by imprisonment for a minimum of one year."

4. The text of Article 133 is set forth in Appendix A.

This is not an idle threat. In the past year at least four persons returning to Yugoslavia from the United States have been arrested for violating the "hostile activity" law.⁵ Two of these persons (from Beloit, Wisconsin) were sentenced to eight years and five years imprisonment, respectively, based upon their participation in demonstrations in the United States.

AI has adopted numerous prisoners of conscience in Yugoslavia who have been convicted of violating the "hostile propaganda" and "hostile activity" laws. These prisoners have been convicted on the basis of private conversations, of authorship of literary works, films and

5. These arrests and the convictions of two returning Yugoslavs, including one U.S. citizen, were reported in the Chicago Tribune on June 11, 1983, and in the European press. These are only some of the examples of persecution in AI's files.

pamphlets, of authorship of letters or articles which were published abroad. Other prisoners of conscience have been convicted for possessing, bringing into Yugoslavia or circulating emigre journals. AI Report, at 13-16.

It appears beyond dispute that respondent has already violated Yugoslavia's "hostile propaganda" and "hostile activity" laws and that he will be imprisoned if he is returned to Yugoslavia. At a minimum, respondent's subjective fear of persecution based upon his anti-communist activities is clearly supported by an objective reality of persecution in Yugoslavia that makes respondent's fear well-founded."

AIUSA makes three arguments in support of respondent's position. First, AIUSA contends that the international "well-founded fear" standard

requires only that an applicant for refugee status demonstrate a subjective fear of persecution which is supported by an "objective situation" in the receiving country.⁶ Second, AIUSA contends that Congress intended to incorporate this international standard in the Refugee Act. Finally, AIUSA contends that the "clear probability" standard, as it has been applied by Petitioner, is inconsistent with the international "well founded fear" standard. For these reasons, the Second Circuit's judgment should be affirmed and Petitioner should be required to apply the

6. The UNHCR and AILA discuss the development and content of the international standard contained in the Convention and Protocol, as well as the practice of states in implementing this standard. AIUSA joins in these portions of the UNHCR and AILA briefs.

international "well-founded fear standard, as this standard has been incorporated in the Refugee Act.⁷

7. The Lawyers Committee for International Human Rights sets forth the legislative history of the Refugee Act and the unmistakable Congressional intent to incorporate the international standard in U.S. domestic law. AIUSA joins in this discussion.

ARGUMENT

THE REFUGEE ACT OF 1980 REQUIRES THE IMMIGRATION AND NATURALIZATION SERVICE TO APPLY THE INTERNATIONAL "WELL-FOUNDED FEAR" STANDARD AND NOT THE "CLEAR PROBABILITY" STANDARD IN MAKING DECISIONS UNDER 8 U.S.C. SECTION 1253(h)(1)

A. The International "Well Founded Fear" Standard Requires Only That An Applicant For Refugee Status Have A Subjective Fear of Persecution That is Supported by an "Objective Situation" in the Receiving Country

1. The UNHCR Handbook Embodies the International "Well-Founded Fear" Standard.

The best explanation of the "well-founded fear of persecution" standard is to be found in the "Handbook on Procedures and Criteria for Determining Refugee Status" ("Handbook") published by the United Nations High Commissioner for Refugees ("UNHCR") in 1979. The UNHCR is the U.N. body charged in Article 35(1) of the Convention with the "duty

of supervising the application of the provisions" of the Convention. In Article II (1) of the 1967 Protocol the United States has undertaken to cooperate with the UNHCR in the exercise of its functions. Petitioner denies the binding legal force of the Handbook, though it has in the past endorsed the use of the Handbook in administrative proceedings. See, e.g., In Re Frentescu, Int Dec. No. 2906 (1982); In re Rodriguez-Palma, 17 I&N Dec 465 (1980).

The Handbook emphasizes the primacy of the subjective element of the "well-founded fear of persecution" standard:

Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.

Of course, the applicant's subjective fear must be "supported by an objective situation." Handbook, ¶38. However, the applicant need not demonstrate that he will be persecuted if returned to his country of origin. Id. As the UNHCR emphasized:

These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well founded . . . Handbook, ¶43.

The international "well founded fear" standard is premised on the reality that applicants will seldom be able to offer "objective" evidence that they will be persecuted if they are returned to their countries. Therefore, a subjective fear of persecution supported

by an "objective situation" of persecution in the receiving country suffices under this standard to clothe the applicant with the protection of international law.

2. The Handbook's Definition of "Well-Founded Fear of Persecution" is Based Upon the Plain Language of the Convention, the Travaux Préparatoires, and three decades of state practice.

The term "well founded fear of persecution" on its face is plainly in harmony with the standard described in the UNHCR Handbook and is in conflict with any standard which requires an applicant, as a practical matter, to prove that he will be persecuted if returned to his country of origin.⁸ The

8. The Vienna Convention on the Law of Treaties, signed April 24, 1970, entered in force January 27, 1980, U.S.T.S. , provides in Article 31(I) that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

plain language is supported by a drafting history and state practice. AIUSA will not recount this history or state practice, but a brief account of the travaux preparatoires leading to the definition of "refugee" in the 1951 Convention underscores the point.

The 1951 Convention arose in the context of a refugee crisis of global proportions in the aftermath of World War Two. Early on the international community adopted the principle that no refugee with "valid objections" would be compelled to return to their country of origin. U.N. G.A. Res A/64, at 12. (1946). This principle was embodied in the Constitution of the International Refugee Organization ("IRO") the U.N. organ responsible for refugee assistance activities from 1947 to 1952. See generally Goodwin-Gill, "Entry and

Exclusion of Refugees," in Michigan Yearbook of International Law (1982).

In 1949 the U.N. Economic and Social Council appointed an Ad Hoc Committee on Statelessness and Related Problems to prepare "a revised and consolidated convention relating to the international status of refugees" ECOSOC Resolution 248 (IX) (August 8, 1949).

In the meantime, the U.N. General Assembly created the UNHCR as the successor to the IRO and as the body which would supervise the implementation of any conventions pertaining to refugees. The early drafting of the 1951 Convention was accomplished by the Ad Hoc Committee in January and February, 1950. Various draft proposals for a definition of "refugee" were made but none of these proposals would have required an applicant to demonstrate that he "would" be

persecuted. An early British draft defined "refugees" as persons who:

"do not enjoy the protection of the State either because the State refuses them protection, or because for good reasons (such as, for example, serious apprehension based on reasonable grounds, of political, racial or religious persecution in the event of their going to that State) they do not desire the protection of that State.

U.N. Doc. E/AC.32/L.2 1(January 17, 1950.) (emphasis added). The next British proposal introduced the "well founded fear" terminology, but did not suggest even remotely a requirement that an applicant demonstrate persecution with near certainty:

" . . . a person who, having left the country of his ordinary residence on account of persecution or well-founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is

not allowed . . . to
return there."

U.N. Doc E/AC.32/L.2 Rev. 1, (January 19, 1950) (emphasis added).

The French draft proposal defined a "refugee" as a person who ". . . refuses to return . . . owing to a justifiable fear of persecution." U.N. Doc E/AC 32/L.3 (January 17, 1950). The draft proposal of the United States contains no objective element in the definition of "refugee" at all. The first provisional draft of the Ad Hoc Committee as a whole defines a "refugee" as:

"2. Any person who (i) is outside the country of his nationality, former nationality or former habitual residence owing to persecution, or well-

founded fear of persecution, for reasons of race, religion, nationality, or political opinion, and (ii) is unable or for valid reasons unwilling to avail himself of the protection of anyone of the said countries, and (iii) belongs to one of the following categories . . ."

U.N. Doc. E/AC.32/1.6 and Corr. 1,
January 23, 1950 (emphasis added).

The Ad Hoc Committee's final draft of Article 1A(1) is substantially similar to Article 1A(2) of the 1951 Convention. U.N. Doc E/AC. 32/5 (February 17, 1950). The Ad Hoc Committee made two interpretative comments regarding the meaning of "well-founded fear." First, in its draft report the Committee noted that:

The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecu-

tion or can give a plausible account why he fears persecution.

U.N. Doc E/AC.32/L38, at 33.

(February 15, 1950) Second, in its final report the Committee comments:

The expression "well-founded fear . . ." means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.

U.N. Doc E/AC.32/S, Annex IV, at 39 (February 17, 1950). Therefore, according to the Ad Hoc Committee a "refugee" is a person who can "give a plausible account why he fears persecution or who can "show good reason why he fears persecution." Neither of these formulations requires an applicant to demonstrate a near certainty or even a proba-

bility of persecution.

- B. Congress Incorporated the International "Well Founded Fear" Standard in the Refugee Act. The "Well Founded Fear of Persecution" Standard and the "Clear Probability" Standard Are Not Identical; the "Clear Probability Standard Because it Requires Proof of a Near Certainty of Persecution is Inconsistent With the Refugee Act.

Congress substantially changed this country's immigration laws with the enactment of the Refugee Act. Significantly, Congress enacted in the Refugee Act for the first time a definition of "refugee" based principally upon the 1967 Protocol, which had incorporated the definition of "refugee" contained in the 1951

Convention.⁹ Thus, the international "well-founded fear" standard was an integral part of the legislative mandate in the Refugee Act.

Significant also was Congress's total rewriting¹⁰ of Section 243(h) which now reads:

9. Section 201(a)(42) of the Act, 8 U.S.C. §110(a)(42) provides:

The term refugee means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, . . . (emphasis supplied).

10. Before 1980, the Attorney General was:

"authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationalality, membership in a particular social group, or political opinion. (Emphasis supplied.)

Thus, the new § 243(h) eliminates the Attorney General's discretion "to withhold deportation," and concerns itself with threats to life or freedom rather than with the certainty of persecution, and adds nationality, and membership in social groups, as classes of protected aliens.

political opinion and for such period of time as he deems to be necessary for such reason."
8 U.S.C. § 1253(h). Congress amended Section 243(h) in 1965 by substituting "persecution on account of race, religion, or political opinion" for the original characterization, "physical persecution."

The apparent genesis of the "clear probability" standard is Lena v. INS, 379 F.2d 536 (7th Cir. 1967). In that case, the court observed, without any citation to authority, that:

[T]he Attorney General employs stringent tests and restricts favorable exercise of his discretion to cases of clear probability of persecution of a particular individual petitioner. 379 F.2d at 538.

Furthermore, the court noted that because the decision to withhold deportation was within the discretion of the Attorney General, the standard for judicial review was whether there had been an abuse of discretion by that officer or his designee. Id. at 537.

The Lena court's "clear probability" test was cited with approval later that year in Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967). Since

1967, both Lena and Cheng Kai Fu have routinely been cited by other courts invoking the "clear probability" standard. Since Lena the courts have occasionally used somewhat different formulations of the test, but whether the alien's burden is proof of a "probability" of persecution (Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969)), or "objective evidence that the alien will be persecuted" (Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1982)), what the courts have consistently tried to determine is whether persecution "would" result from the deportation decision. Indeed, the failure of an alien to offer evidence that "he would in fact be persecuted" (Kashani, 547 F.2d at 380) upon his deportation is an example of how the "clear probability" standard focuses upon the ability of the INS to predict

with near certainty whether a future event will occur, rather than treating the alien as one with a protectable interest as long as his bona fide fear of persecution is based upon objective data which render the fear a "well-founded" one.

Petitioner concedes that § 243(h) forbids deportation of an alien who proves his "fear of persecution" is "well-founded." INS Brief, at 20. However, Petitioner contends that Congress, when it enacted the Refugee Act, intended no change in the standard by which such proof is to be judged, and so the 1967 Lena test still applies to §243(h) decisions. The entirety of that argument depends upon the asserted ambiguity of the relevant provisions of the Act, and of the legislative intent which Petitioner says is indicative that

Congress did not intend to change the judicially-created "clear probability" test--a test which was used to give effect to the now eliminated discretion of the Attorney General under old § 243(h). Petitioner is simply wrong.

First, whether Congress thought of "well-founded fear" as the equivalent of "clear probability" cannot be determined from the legislative history of the Act which contains no mention of the subject. Neither do the Committee references to § 243(h) support the Petitioner's view. For example, Petitioner quotes at length from the 1979 House Report dealing with an earlier version of the 1980 Act. INS Brief, at 37-38. The reference therein to § 243(h) states in part:

Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33

[prohibiting the return of a refugee to a place where his life or freedom would be threatened on account of political beliefs], the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. This legislation does so by prohibiting, with certain exceptions, the deportation of an alien to any country if the Attorney General determines that the alien's life or freedom would be threatened on account of race, religion, nationality membership in a particular social group, or political opinion.

H.R. Rep. No. 96-608, 96th Cong., 1st Sess. 18 (1979).

It is likely that the reference to § 243(h) as having "been held by court and administrative decisions to accord aliens the protection required under Article 33" is to In re Dunar, 14 I&N Dec. 310 (BIA 1973). In Dunar, the Board of Immigration Appeals opined that because the Attorney General had never

failed to exercise his discretion to withhold the deportation of an alien who the Attorney General believed "would be persecuted," the "mandatory quality" INS Brief, at 29, n.29) of Article 33 did not require a change in the application of old § 243(h). Clearly, Congress was aware of the view expressed by the Board in Dunar and by the Petitioner herein but nonetheless completely rewrote § 243(h) because the "change in Section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements." H.R. Rep. 96-608, supra, at 18 (emphasis added).

The change in the language of § 243(h) was not, as the Petitioner suggests, trivial; nor was it simply for cosmetic purposes. Indeed, even the Dunar decision, the case principally

relied upon by the Petitioner for the proposition that the U.S. accession to the 1967 Protocol effected no change in determination under § 243(h), fails to support Petitioner's position. The Dunar Board was confronted with the question whether the Attorney General's discretion pursuant to § 243(h) had been eliminated because the Protocol, while not purporting to amend § 243(h), incorporated the 1951 Convention, Articles 1 and 33 of which appeared to prohibit the discretion conferred by § 243(h) at the time.

Although Article 33 prohibits the return of a refugee to a country "where his life or freedom would be threatened" on account of race, religion or politics, the authority conferred by § 243(h) permitted the Attorney General to exercise his discretion in favor of deporting

refugees who faced persecution. Thus, §243(h) was clearly in conflict with the language of the Protocol. The Board in Dunar acknowledged the fact that the law had changed, but said that the practice of the Attorney General was "not in conflict" with the new requirements of the Protocol because no alien who had proven he would be persecuted upon deportation to a particular country had ever been deported. Id. at 321-323. Thus, Petitioner's argument that no change in law was effected by the Protocol is demonstrably incorrect because the Attorney General's discretion was, in fact, legislatively eliminated and his "practice" became obligatory.

Dunar was also concerned with whether the "well-founded fear" formulation required by the Protocol affected the previously used "clear probability"

standard. While the Board found the language differences "reconcilable" and "compatible," it cited with approval the report of the Ad Hoc Committee which had framed the "well-founded fear" provision and quoted the definition in that report: "well-founded fear" means that the "person has either been a victim of persecution or can show good reason why he fears persecution." Id. at 319-320. In Dunar the Board was faced with a claim that the applicant's "own state of mind . . . is the primary test" and evidence from the applicant which focused almost exclusively on subjective fear of persecution. The Board found no difficulty in denying that accession to the Protocol had worked so fundamental a change that an applicant's mere conjecture would justify the "well-founded fear" standard. Id. at 319. As with so many

cases relied upon by Petitioner, however, Dunar's seeming willingness to accommodate the "well-founded fear" standard to the old "clear probability" standard provides no substantial support for Petitioner's position because there was no evidence in those cases that the applicant's fear of persecution had any objective basis. E.g., Gena v. INS, 424 F.2d 227 (5th Cir. 1970); Sodeghzadeh v. INS, 393 F.2d 894 (7th Cir. 1968); Shkukani v. INS, 435 F.2d 1378 (8th Cir. 1971).

Since the Board's decision in Dunar, several courts have recognized that the United States accession in 1968 to the Protocol effected changes in our immigration laws. Indeed, the viability of the "clear probability" standard was seriously questioned by the courts after 1968 and before the enactment of the 1980 Refugee Act. For example in

Coriolan v. INS, 559 F.2d 993, 997 (5th Cir. 1977), the court stated that, notwithstanding Dunar's conclusion that old § 243(h) was applied consistently with the requirements of Article 33 of the Convention, it was an open question whether the Attorney General's discretion to order deportation after a finding of likely persecution would violate our obligation under the Protocol. See also Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1982) (the "well founded fear" and "clear probability" standards are different but "will in practice converge").

The choice of tests will not affect the outcome in some cases and so whether the two approaches "converge" or not is unimportant in such instances. For example, where the alien's evidence is disbelieved or where there is no rational basis to conclude that the alien might

suffer persecution if deported, it makes no difference whether the "clear probability" test is used or whether the "well-founded fear" formulation is employed. On the other hand, if an alien has good reason to believe that he will be persecuted for his political beliefs upon deportation but is unable to prove that he "will be" persecuted, it matters greatly which test is used, and it matters not at all to that alien whether the two different approaches "will in practice converge." Likewise, the Coriolan court noted that the alien's burden of proving a "well-founded fear" was less than the burden under the "clear probability" test. 559 F.2d at 997. This case is a perfect example of a situation in which the result depends on which test is employed.

Faced with the question whether the

Act's elimination of the Attorney General's discretion to withhold deportation, and its mandate that the Attorney General "shall not" deport an alien with a well-founded fear of persecution, worked any change in the standard for review of the INS finding that persecution was not likely to result, the court in McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981) observed:

The new § 243(h) removes the absolute discretion formerly vested with the Board. A factual determination is now required and the Board must withhold its deportation if certain facts exist. This change requires judicial review of the Board's factual findings if the 1980 Amendment to § 243(h) is to be given full effect. Agency findings arising from public record-producing proceedings are normally subject to the substantial-evidence standard of review. [Citations]. The INS does not cite any portion of the legislative history of the 1980 Amendment which suggests that, contrary to normal

principles of administrative law, § 243(h) factual findings are discretionary.

The court concluded that the 1980 amendment to § 243(h) required a change to the standard for review of Board findings. Noting that the old § 243(h) permitted the withholding of deportation at the discretion of the Attorney General and that the court had previously applied the abuse of discretion standard to such decisions, the court concluded that the elimination of the Attorney General's discretion required such decisions now to be reviewed by the substantial evidence standard. Id. Holding that the INS's finding that the alien would not likely be subject to persecution was not supported by substantial evidence, the court granted the alien's petition for review. Id. at 1319.

Thus, contrary to the INS' argument

that it is "business as usual," a significant change affecting the review of § 243(h) decisions has resulted from the 1980 Act becoming law. Consequently, the argument that new and old § 243 are equivalents is incorrect.

Since the 1968 accession to the Protocol with its definition of refugee as one who has a "well-founded fear" of persecution, several courts have indicated a willingness to liberalize the "clear probability" standard even while reciting Petitioners' argument (before this Court and in Dunar, supra), that the two formulations can be reconciled. Other cases have suggested that the "clear probability" test remains essentially concerned with accurate predictions of the behavior of foreign governments. E.g., Kashani, supra.

At best, then, there is confusion

in the cases as to what is the proper standard and how to articulate it. Part of that confusion results from unpersuasive attempts to equate the "well-founded fear" language with the stringent requirements of the "clear probability" test. Compounding that confusion is Petitioners' argument that because the "well-founded fear" formulation requires objective evidence to validate the alien's state of mind, there is no difference between that standard and the "clear probability" standard because the latter also requires objective evidence that the alien "will be" persecuted if deported. The argument is a non sequitur. Clearly, the fact that "objective" evidence may be required under both formulations does not help decide whether the burden is greater for one than the other. Thus, the inquiry

neither begins nor ends with the conclusion that both formulations have objective components.

Indeed, it is misleading in another sense to argue that both tests have objective components. A major distinguishing feature between "clear probability of persecution" and "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion," is the nature of the evidence is the nature of the evidence required in order to satisfy each standard and for the alien thereby to become statutorily eligible for the withholding of deportation. As pointed out by the Second Circuit below (678 F.2d at 405-406), when discussing the Handbook on Procedures and Criteria for Determining Refugee Status, "well-founded fear" has

both subjective and objective elements:
"The applicant's state of mind is thus relevant, as are conditions in the country of origin, its laws, and experiences of others. Although there may be difficulty involved in using evidence pertaining to the "experiences of others" in a beneficial manner,¹¹
"clear probability tends to focus almost exclusively on the objective component.

11. See, e.g., Paul v. INS, 521 F.2d 194, 200-201 (5th Cir. 1975) ("The suicide of one [Haitian . . . after receipt of Notice of Deportation] and attempted suicide of another is not, without more, and contrary to petitioner's contention, evidence of their fear or indicative that their fear is well-founded"); Rosa v. INS, 440 F.2d 200 (1st Cir. 1971); Zamora v. INS, 534 F.2d 1055 (1976); McMullen v. INS, 658 F.2d 1312, 1317 (9th Cir. 1981) ("The Board found that . . . the articles and reports generally documenting [Provisional Irish Republican Army] terrorism were irrelevant because they did not refer specifically to persecution directed at McMullen.")

The "clear probability" test, for example, and through it the Board, despite references to persecution as encompassing a threat, is much more interested in persecution as a physical fact:

Some sort of a showing must be made and this can ordinarily be done by objective evidence. The claimant's own testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted.

Dunar, 14 I&N Dec. at 319. See, also, Paul v.INS, 521 F.2d 194, 196-197 (5th Cir. 1975)("In order to qualify for discretionary withholding of deportation, the applicants must prove their departure from Haiti was politically motivated and that on return they face persecution for reasons political in nature."); McMullen v.INS, 658 F.2d 1312, 1317 (9th Cir. 1981) ("The Board found that McMullen's personal

testimony was not credible because it was self-serving" Rejaie v. INS, 691 F.2d 139, 144, 147 (3rd Cir. 1982) ("Therefore, we must conclude that petitioner did not demonstrate by objective evidence a realistic likelihood that he would be persecuted in his native land"); and Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983).

What these cases also demonstrate is a confusion of concepts. The subjective component of "well-founded fear" refers most particularly to "the applicant's state of mind" (Stevic, 678 F.2d at 406), not just to the applicant's testimony, which may consist of both subjective and objective narration. Those using what amounts to a "clear probability" test (e.g., Paul v. INS, supra; Rejaie v. INS, supra; Matter of

Dunar supra; Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967); Lena v. INS, 379 F.2d 536 (7th Cir. 1967)), equate objectivity only with the degree of documentation and corroboration of the applicant's testimony that he will be persecuted. A focus on subjectivity would be to focus, as did the Second Circuit below on the applicant's state of mind as revealed in the applicant's testimony and otherwise. The goal is credibility and the reasonableness of a state of mind allegedly dominated by fear of persecution or "a desire to avoid a situation entailing the risk of persecution' . . ." (Stevic, 678 F.2d at 406). The objective component is that the "fear" must be "well-founded" i.e., rational and reasonable, and this cannot absolutely depend upon the degree of supporting documentation, which is often

unavailable to the applicant.

While the cases are often confused about the proper standard to apply and about the method of the standard's application, what is clear is that one meaning commonly ascribed by the courts and the INS to the "clear probability" standard is that the alien must prove that he will in fact be subject to persecution if deported to a particular country. See, Kovac v. INS, supra; Rejaie v. INS, supra. That some courts apparently have concluded that the "well-founded fear" test can be satisfied by evidence which is more than the mere conjecture of the alien that he will be persecuted, and that such a minimal standard is consistent with the "clear probability" formulation (e.g., Kashani supra), does not resolve the issue. In other words, the fact that there are

some cases invoking the "clear probability" formulation that have apparently applied a more liberal standard than other cases means only that there is no standard consistently applied in cases involving persecution claims.¹² Thus, Petitioners' "equivalence" argument is impossible to verify because the standard is a "moving target." While Petitioner makes it difficult to keep track of the pea, that diversion is insufficient basis upon which to conclude that Congress intended no more than to dress-up our immigration laws for public relations purposes.

12. The INS assertion that the two tests "have always been equivalent" (INS Brief at 49) and that the "clear probability" standard has been "consistently employed" (Id. at n.46), are necessary to its argument that no change in the standard was effected by the Act. Because the premise is demonstrably incorrect, the INS's conclusion is supported only by self-serving administrative decisions.

Petitioner's position that nothing changed with enactment of the Refugee Act flies in the face of reason. To say that "conjecture" only, with no support, will not suffice for statutory eligibility, as the Third Circuit did in Rejaie v. INS, 691 F.2d 139 (3rd Cir. 1982), and Marroquin-Manquez v. INS, 699 F.2d 129 (3rd Cir. 1983), does not advance the ball because mere "conjecture" does not suffice under the "well-founded fear" standard either. The fact is that the "clear probability" and "well-founded fear" tests are different standards -- even if some courts have equated them -- and that the well-founded fear" standard was adopted by Congress in the Refugee Act. The changes enacted in 1980 have been recognized by the Second Circuit and by other courts as well. See McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981);

Bertrand v. Sava, 684 F.2d 204 (2nd Cir. 1982); Almirol v. INS, 550 F.Supp. 253 (N.D. Calif. 1982); and Reyes v. INS, 693 F.2d 597 (6th Cir. 1982) (which specifically agrees with Stevic that "clear probability" is too stringent and that the "well-founded fear" test is the appropriate standard).

Finally, this Court should conclude that the 1980 Act changed the standard of proof for an applicant seeking to avoid deportation under § 243(h) because the Act requires that a uniform test of "refugee" be applied to all aliens, thereby eliminating the previous distinction between aliens seeking to enter this country as refugees under old § 203(a)(7) and deportable aliens already in this country seeking eligibility under the old § 243(h). Under the old law, aliens seeking admission as refugees

under § 203(a)(7) could be awarded conditional entries by the Attorney General upon proof of a "fear of persecution on account of race, religion, or political opinion," provided they were fleeing certain countries. The Board "fear of persecution" standard seems much less onerous than what the INS and the courts have held to be sufficient evidence to meet the "clear probability" test previously in use. Recognition by the Board in Matter of Tan that the "clear probability" test is more stringent compels the conclusion that "well-founded fear" is more closely analogous to "good reason to fear" than it is to "clear probability" that the alien will be persecuted if deported. Because the 1980 Act eliminates the distinction between aliens seeking to avoid deportation and aliens seeking admission and

mandates a uniform test of "refugee" to be applied to either category of alien, it would indeed be anomalous, as the Stevic court observed, if the 1980 Act recognized that the legal standard under § 203(a)(7) was much less stringent than the "clear probability" test employed by the Board in evaluating applications for withholding under § 243(h). Matter of Tan, 12 I&N, Dec. 564 (1967). If the alien could show "good reason" for such fear, he met the § 203(a)(7) standard. Matter of Ugricic, 14 I&N Dec. 384, 385-386 (1972). "Good reason" to fear persecution sufficient to meet the requirements of Section 203(a)(7) is the same test, phrased in the same words used by the authors of Article 33 of the Convention, the language of which was adopted by Congress in Section 201(a)(42) of the 1980 Act defining the word


"refugee."

Intuitively, the proof necessary to demonstrate a "good reason" for having a fear of persecution seems much less onerous than what the INS and the courts have held to be sufficient evidence to meet the "clear probability" test previously in use. Recognition by the Board in Matter of Tan that the "clear probability" test is more stringent compels the conclusion that "well-founded fear" is more closely analogous to "good reason to fear" than it is to "clear probability" that the alien will be persecuted if deported. Because the 1980 Act eliminates the distinction between aliens seeking to avoid deportation and aliens seeking admission and mandates a uniform test of "refugee" to be applied to either category of alien, it would indeed be anomalous, as the

Stevic court observed, if the 1980 Act were to be interpreted as increasing the burden for the category of aliens previously covered by Section 203(a)(7) by imposing on them the "clear probability" standard of old 243(h) rather than the "good reason to fear" standard applicable to them before 1980.

Petitioner attempts to belittle the Stevic analysis by adverting to the small numbers of aliens covered by old § 203(a)(7) and by arguing that an enhanced burden on those aliens would be consistent with the purposes of the 1980 Act. The argument is simply another example of Petitioner's attempt to walk both sides of the street. On the one hand, Petitioner contends that Congress intended no change in the test by which an applicant for refugee status is measured. On the other hand, Petitioner

asserts that Congress intended the test to be changed for a small number of aliens seriously subject to § 203(a)(7). Petitioner can not have it both ways. The answer, as the Stevic court noted, is that Congress clearly intended to give effect to the humanitarian purposes of the Convention and Protocol. It would be an anomalous judicial frustration of that purpose to impose on any class of refugees a more difficult burden than had previously existed without any evidence that Congress intended that result. Far more consistent with the history of the Act and its international genesis, together with the rather striking changes in language to § 243(h), is acceptance of the fact that the "well-founded fear" test, which Petitioner admits is the enacted formulation, is different from the court-



created and inconsistently-applied
"clear probability" standard. The
difference in the words themselves would
seem to most to mean different things.
But when it is understood that "clear
probability" means proof that persecution
will result, the apparent difference in
the tests could hardly be more obvious.

CONCLUSION

This case exemplifies the differences between the "clear probability" standard employed by the INS and the "international "well-founded fear of persecution" standard incorporated by Congress in the Refugee Act of 1980.

Petitioner's argument that the INS should be permitted to conduct business as usual can be accepted only if this Court finds that Congress had no intention of incorporating international standards into U.S. domestic law. "An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). This court should take Congress at its word and find that the Refugee Act of 1980 requires

the INS to apply the international "well-founded fear of persecution" standard, as it is embodied in the UNHCR Handbook, and not the stringent, formless "clear probability" standard which has been employed by the INS over the years.

Respectfully submitted,

August 29, 1983

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*Pamela Dunn, Donald Green, Mary Andres, and Ken Gross, students at Southwestern University School of Law, provided valuable research assistance in the preparation of this brief.

APPENDIX "A"

Article 133 provides as follows:

"1) Whoever, by means of an article, leaflet, drawing, speech or some other way, advocates or incites the overthrow of the rule of the working class and the working people, the unconstitutional alteration of the socialist social system of self-management, the disruption of the brotherhood, unity and equality of the nations and nationalities, the overthrow of the bodies of social self-management and government or their executive agencies, resistance to the decisions of competent government and self-management bodies which are significant for the protection and defence of the country; or whoever maliciously and untruthfully portrays socio-political conditions in the country shall be punished by imprisonment for from one to 10 years.

"2) Whoever commits an offense as mentioned in paragraph 1) of this Article with aid or under influence from abroad, shall be punished by imprisonment for at least three years.

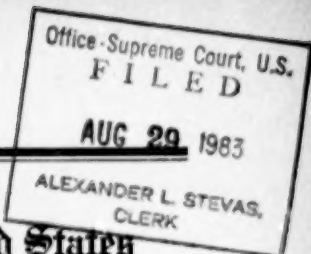
"3) Whoever sends or infiltrates agitators or propaganda material into the territory of the SFRJ in order to perform an offense as mentioned in paragraph 1) of this Article shall be punished by imprisonment for at least one year.

"4) Whoever, with the intention of distribution, prepares or reproduces hostile propaganda material or whoever

has such material in his possession knowing that it is intended for distribution, shall be punished by imprisonment for at least six months and not more than five years."

AI Report, at 12-13.

No. 82-973



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v.

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VOLUNTARY AGENCIES FOR FOREIGN SERVICE
AND THE WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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IN SUPPORT OF RESPONDENT**

INTEREST OF AMICI CURIAE

The American Council of Voluntary Agencies for Foreign Service (ACVA) is an association of 45 humanitarian and development assistance groups. ACVA was established in 1943 to provide a means for consultation, coordination, and planning to assure the most effec-

tive use of contributions of the American community for the assistance of refugees. The members of ACVA's Committee on Migration and Refugee Affairs who participated in the approval of this brief are:

American Council for Nationalities Service
 American Fund for Czechoslovak Refugees
 Church World Service
 HIAS (Hebrew Immigrant Aid Society)
 International Rescue Committee
 Lutheran Immigration and Refugee Service
 Polish American Immigration and Relief Committee
 The Right Reverend John M. Allin for the
 Presiding Bishop's Fund for World Relief/
 The Episcopal Church
 Tolstoy Foundation

ACVA has a special interest in the meaning of "well-founded fear" of persecution, since it strongly and actively supported accession to the Refugee Protocol in 1968. The decision here will affect ACVA and its constituencies.

The Washington Lawyers' Committee for Civil Rights Under Law is the Washington, D.C. affiliate of the Lawyers' Committee for Civil Rights Under Law, which was organized in 1963, at the request of President Kennedy, to involve private attorneys in the national effort to assure equal rights for all members of society. The national and Washington Lawyers' Committees long have provided volunteer legal representation to individuals with claims of unlawful discrimination and other invasions of civil rights. In 1978 the Washington Lawyers' Committee established an Alien Rights Project and began regularly to represent noncitizens who fear persecution if returned to their homelands. The decision in this case will affect the activities of the Washington Lawyers' Committee on behalf of such noncitizens.

SUMMARY OF ARGUMENT

The question presented by this case is not, as the Government's brief suggests, simply one of verbal formulation. The Government frames the question as whether a "clear probability" or "realistic likelihood" of persecution describes the same situation as the phrase "well-founded fear" of persecution. In fact, the question is about evidence, not verbal formulas. As the Second Circuit held, the Government seeks to require of applicants for refugee status a type and level of evidentiary showing that is inconsistent with the Immigration and Nationality Act ("INA") and the U.N. Refugee Convention.

The Government's error is threefold. First, the Government insists that an alien establish that he will be singled out, or targeted, for persecution in his country of origin. But such a showing is only one of many types of evidence that could tend to establish a likelihood of persecution; to disregard all other types is inconsistent with any reasonable construction of "well-founded fear" of persecution. Second, the Government ignores the alien's subjective fear of persecution, stripping the "fear" out of the "well-founded fear" standard. And third, the Government demands a quantity of evidence in excess of that required by the statute—a quantity that would be consistent only with a statute requiring certainty of persecution.

The Government's theory of the case rests on the assertion that Congress intended to make the INS view of "well-founded fear" the law of the land. That theory is unpersuasive. First, the construction of the statute advocated by the Government would involve the United States in a breach of its treaty obligations under the Refugee Convention and Protocol; such a construction is to be avoided if at all possible. Second, in 1980 Congress expressly incorporated the treaty standard into the

statute. Finally, the Government's theory depends on the preexistence of a coherent practice of requiring the evidentiary showing the Government propounds—a practice that has never existed.

ARGUMENT

IN REQUIRING A CLAIMANT TO PROVE WITH CERTAINTY THAT HE WILL BE TARGETED FOR PERSECUTION AND IN IGNORING THE CLAIMANT'S SUBJECTIVE FEAR, THE GOVERNMENT MISCONSTRUES THE STATUTE AND THE REFUGEE CONVENTION.

Section 243(h) of the Immigration and Nationality Act¹ and article 33 of the 1951 U.N. Convention Relating to the Status of Refugees² provide that an alien shall not be forcibly returned to a country where circumstances exist that cause the alien to have a "well-founded fear" of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. For the reasons set forth below, the Second Circuit was correct in holding that, "under Section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution,"³ and that "[t]he BIA's denial of Stevic's second motion was based on a legal test which . . . is no longer the law."⁴

¹ 8 U.S.C. § 1253(h) (Supp. IV 1980).

² 189 U.N.T.S. 137.

³ *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982).

⁴ *Id.* at 409. In order to prevail on a motion to reopen deportation proceedings, the claimant must present a *prima facie* case of eligibility for relief. *INS v. Wang*, 450 U.S. 139, 141 (1981) (considering reopening question under INA § 244). Since the Board of Immigration Appeals ("BIA") applied an erroneous legal standard in deciding whether Mr. Stevic had presented a *prima facie* case, its decision was properly reversed. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

A. The Government's Construction of the Statute Should Be Rejected Because It Would Place the United States in Violation of Its Treaty Obligations.

In 1968, the United States became a party to the 1967 United Nations Protocol Relating to the Status of Refugees.⁵ Under article 1 of the Protocol, the United States undertook to adhere to the 1951 U.N. Convention Relating to the Status of Refugees, which provides certain rights and protections to "refugees."⁶ The Convention and Protocol define as a "refugee" a person who,

"owing to *well-founded fear* of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."⁷

The Convention and Protocol do not give refugees an absolute right to permanent asylum in any country of refuge. However, key among the protections they give a refugee is the right of *nonrefoulement* (nonexpulsion), set forth in article 33:

"No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁸

⁵ 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 ("Protocol").

⁶ 189 U.N.T.S. 137 ("Convention").

⁷ *Id.*, art. 1(A)(2) (emphasis added); see also Protocol, art. I(2).

⁸ Convention, art. 33(1). Article 33(2) denies the benefits of Article 33(1) to a refugee "whom there are reasonable grounds for

Article 33 prohibits the forcible return of a refugee to his country of origin—which is the place where “his life or freedom would be threatened.”⁹ The central inquiry involved in determining a *nonrefoulement* claim is whether circumstances exist in the country of proposed return which cause the claimant to have a “well-founded fear” that he will face persecution there.

A leading commentator on refugee law has observed that “well-founded fear of being persecuted . . . is probably the most difficult part of the definition [of refugee] to interpret.”¹⁰ The Government would obviate the difficulty by supplanting the broad concept of “well-founded fear” with a one-dimensional “singling out” test of its own. Because that approach would place the United States in violation of its international obligations, it must be rejected.

1. *To require the evidentiary showing proposed by the Government would conflict with the obligations imposed by the Convention and Protocol.*

To be a refugee under the Convention and Protocol, one must have a “fear” of persecution that is “well-founded.” “Well-founded” means that the fear must be justified in light of the external facts;¹¹ but the treaty

regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

⁹ 2 A. Grahl-Madsen, *The Status of Refugees in International Law* § 178, at 93 (1972). See also Weis, *The Concept of Refugee in International Law*, 87 *Journal du Droit International* 928, 940 (Oct.-Nov.-Dec. 1960). Dr. Weis, former Legal Adviser to the United Nations High Commissioner for Refugees, and Professor Grahl-Madsen are two of the world's leading authorities on international refugee law.

¹⁰ Weis, *supra* note 9, at 970.

¹¹ See, e.g., *Hearings on Refugee Act Reauthorization Before the House Committee on the Judiciary, Subcommittee on Immigration*,

nowhere limits the types of facts that are to be considered in this connection. In particular, the treaty does not allow a signatory nation to refuse to consider any evidence other than proof that the government in the country of origin will actually single out or target the alien for persecutory treatment.

The U.N. Ad Hoc Committee on Statelessness and Related Problems, which drafted the Convention, interpreted "well-founded fear" to mean "that a person has either actually been a victim of persecution or *can show good reasons why he fears persecution.*"¹² It placed no limitation on the types of "good reasons" that could suffice. As expert commentators have recognized, the universe of possibly relevant external facts is as broad as the range of possible circumstances that may exist.¹³ Proof that the claimant will be targeted for persecution by the authorities is not necessary to establish well-founded fear. To the contrary, depending on the circumstances, persecutory action that is aimed at a group, or is generalized, or is even random may support a claim.¹⁴

Refugees, and International Law, 98th Cong., 1st Sess. (statement of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Department of Justice, at 4) (June 7, 1983).

¹² United Nations Economic and Social Council, Report of the Ad Hoc Committee on Statelessness and Related Problems 39, E/1618, E/AC.32/5 (1950) (emphasis added).

¹³ "[I]t is apparent that the likelihood of becoming a victim of persecution may vary from person to person. For example, a well-known personality may be more exposed to persecution than a person who has always remained obscure. Also, some persons are more strong-willed or more outspoken than others, and therefore more susceptible to attract the attention of the authorities than other people." 1 A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 175 (1960).

¹⁴ "Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either

The United Nations High Commissioner for Refugees ("UNHCR") has endorsed this position. Because UNHCR is the agency charged with implementing and supervising the Convention on an international level,¹⁵ its views are entitled to significant weight. The Government apparently recognizes this and attempts to reconcile its positions with those of UNHCR.¹⁶ But that attempted reconciliation rests on a selective and misleading review of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*.¹⁷ The Government's evidentiary requirements are in fact inconsistent with the *Handbook*.

The Government quotes part of a passage from the *Handbook* to establish that "[t]he UNHCR thus recognized . . . that an applicant for refugee status . . . must continue to show 'good reason why he individually fears persecution.'" ¹⁸ However, the unedited passage cannot be said to support the Government's reading. The *Handbook* states that, *unless* a "group determination" of refugee status is appropriate—"whereby each member of the group is regarded *prima facie* . . . as a refugee"—

"an applicant for refugee status must normally show good reason why he individually fears persecution.

put to death or sent to some remote 'labour camp,' or that people are arrested and detained for an indefinite period on the slightest suspicion of political non-conformity. In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return. It cannot—and should not—be required that an applicant shall prove that the police have already knocked on his door." 1 A. Grahl-Madsen, *supra* note 13, § 78, at 180.

¹⁵ See Convention, preamble; Protocol, art. II.

¹⁶ Br. Pet. 34-35.

¹⁷ *Id.*

¹⁸ Br. Pet. 35, quoting *Handbook* ¶ 45 (emphasis added by the Government).

It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word 'fear' refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution."¹⁹

And the *Handbook* elsewhere expressly recognizes the relevance of the experiences of the alien's "friends and other members of the same racial or social group."²⁰ Thus, the *Handbook*, like the authors of the treaty and the expert commentators, rejects the notion that only proof that the individual will be specifically targeted for persecution can suffice.

There can be no doubt that the Government seeks to render irrelevant all types of evidence except proof of "singling out." It asserts that its position would accommodate "various forms" of objective evidence,²¹ but immediately adds that such evidence must "provide some indication that the particular alien would be singled out for persecution upon his return."²² The BIA rejected Mr. Stevic's claim because he did not prove that "he *will be singled out* for persecution."²³ The BIA decision, while not unambiguous, indicates that the BIA required evidence, "specifically relating to the respondent,"²⁴ that persecution will certainly meet him upon his return. And in other recent litigation the Government has advocated the same inflexible rule. In *Almirol v. INS*,²⁵ the court overturned a denial of refugee status precisely because the Government was demanding—wrongly in the court's view

¹⁹ *Handbook* §§ 44-45.

²⁰ *Id.* § 43.

²¹ Br. Pet. 23.

²² Br. Pet. 24.

²³ See Pet. Cert., App. D, at 31a (emphasis added).

²⁴ *Id.*

²⁵ 550 F. Supp. 253 (N.D. Cal. 1982).

—that the applicant “show that he was the ‘target’ of the Philippine government’s persecution.”²⁶ Such a requirement cannot be squared with the Convention and Protocol.

The Government’s position conflicts with the treaty also in that it would give sole significance to the external facts, thus reading the subjective element of “fear” out entirely. The UNHCR *Handbook* affirms emphatically “the importance that the definition attaches to the subjective element.”²⁷ It goes on to explain:

“Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.”²⁸

By including a reference to the applicant’s state of mind, the treaty not only adds a second element that he must show, but also recognizes the sometimes complex interplay between his state of mind and the external situation. The existence of a sincere and strongly held—even “exag-

²⁶ 550 F. Supp. at 256. “The Commissioner [of INS], however, states in the record that ‘there is no firm evidence to establish the applicant is actually being sought by this government for punitive purposes.’” *Id.*

The Government’s stringent “singling out” approach is further illustrated by its position toward Ethiopians who fear return to the Communist regime of Mengistu Haile-Mariam. The State Department has observed that “it is ‘very difficult’ for applicants to meet the standards for asylum unless they are *well-known political enemies of the Ethiopian government* or are related to one.” *Apparent Policy Inconsistency: U.S. Pushing Ethiopians to Go Home*, Wash. Post, Jan. 26, 1982, at A1 (emphasis added). The Government’s approach bars the claims of Ethiopians who are not politically prominent, but who are “Westernized, highly educated, many of them children of officials in the Haile Selassie Government overthrown by Col. Mengistu,” and who have a well-founded fear of persecution in a country where suspected antirevolutionaries have been arrested, tortured, summarily executed, and harassed. Lewis, *Hypocrisy Wins Again*, N.Y. Times, Jan. 4, 1982, at A23.

²⁷ *Handbook* ¶ 41.

²⁸ *Id.*

gerated"—subjective fear may, in conjunction with the external facts, have a bearing on whether that fear is well-founded.²⁹ By ignoring the subjective element, the Government ignores this interrelationship as well as the text of the treaty and the statute.

Finally, the quantity of evidence demanded by the Government is inconsistent with the accepted international understanding of what the treaty means. The very words, "well-founded fear," are inconsistent with certainty. And it is generally understood that the evidentiary realities of refugee claims make certainty unattainable:

"The normal rules of evidence are, however, difficult to apply in proceedings for the determination of refugee status. The applicant may call witnesses in support of his statement and he may sometimes be able to present documentary evidence. But it follows from the very situation in which he finds himself as an exile, that he will rarely be in a position to submit conclusive evidence. It will essentially be a question whether his submissions are credible and, in the circumstances, plausible."³⁰

²⁹ "Thus the circumstances and background of the person, his psychological attitude and sensitivity towards his environment play a role as well as the objective facts—what may be regarded as 'good reasons' in one case may not be 'good reasons' in another."

Weis, *supra* note 9, at 970. See also 1 A. Grahl-Madsen, *supra* note 13, §§ 76-79, at 173-81 (to determine if fear is "well-founded," the decisionmaker must consider both the claimant's state of mind and the objective facts).

³⁰ Weis, *supra* note 9, at 986. See also 2 A. Grahl-Madsen, *supra* note 9, § 178, at 93 ("The rule of *nonrefoulement* [is] an obligation to refrain from forcibly returning a refugee to a country where he is likely to suffer political persecution.") (emphasis added).

In demanding a "clear probability of persecution,"³¹ the Government would erect a hurdle higher than the treaty contemplates.³²

In interpreting the treaty, the Court "must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" ³³ Moreover, "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." ³⁴ In this case the language of the treaty, the international understanding about its meaning, and generosity toward the rights granted by it all favor a reading that is in conflict with the Government's cramped position.³⁵

³¹ *E.g.*, Pet. Br. 4, 8, 10.

³² See Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 Int. Law. 204, 234 (1969) (the burden of proof required by the BIA under section 243(h) "is an almost impossible one to carry"). The late Professor Evans, an astute and thorough chronicler of United States asylum and refugee law, found that the Government's "rigorous interpretation" of section 243(h) did not comport with congressional intent even before the 1980 Refugee Act. *Id.* at 253.

³³ *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982), quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963).

³⁴ *Factor v. Laubheimer*, 290 U.S. 276, 293-94 (1933); see *Kolovrat v. Oregon*, 366 U.S. 187, 192-93 (1961) ("This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect.") (footnote omitted); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) ("As [treaties] are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.") (emphasis added).

³⁵ The Court has said that "in resolving doubts the construction of a treaty by the political departments of the government, while

2. In ratifying the Convention and Protocol, the United States expressed no reservation qualifying its obligation to comply with the treaty standard.

The Government argues that the United States ratified the Refugee Protocol on the understanding that it would not alter or enlarge basic U.S. legal obligations toward refugees. Therefore, the Government argues, the Protocol (and Convention) cannot be said to have any effect on the standard used by the INS in deciding section 243(h) claims.

The legislative history of U.S. accession to the Protocol does not support this argument. Carefully read, the history shows that the executive branch assured the Senate that (a) the Protocol would not require the United States to admit greater numbers of refugees as *immigrants*,²⁸ and (b) the Protocol's provisions setting forth the civil, political, economic, and social rights of refugees in countries of refuge would not require the United States to take any steps to implement those rights. These assurances did not foreclose changes in the manner in which

not conclusive upon courts called upon to construe it, is nevertheless of weight." *Factor v. Laubenheimer*, 290 U.S. at 295. But this rule of interpretation has no force where, as here, there is nothing in the "available diplomatic records and correspondence," *id.*, that provides a basis for according "weight" to the Government's views. Moreover, *Factor* and *Kolovrat v. Oregon*, *supra*, refer a court to the diplomatic history of a treaty, *see, e.g.*, 366 U.S. at 194-95; 290 U.S. at 294-95; they do not wrap the Government's *post hoc* arguments in a mantle of validity. In any event, even if the views of the agencies charged with the implementation of treaties are entitled to weight, there has been no consistent view of refugee status held by INS and the State Department. *See* Part C *infra*.

²⁸ *See* S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 6, 10 (1968) (testimony of Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, Department of State). *See also* S. Exec. K, 90th Cong., 2d Sess. III (1968) (President's letter of transmittal). Neither section 243(h) nor article 33 provides for the admission of refugees as immigrants—that is, aliens admitted for permanent residence.

section 243(h) was implemented to comply with article 33. Indeed, such changes may have been anticipated.

The Protocol and Convention constitute in large part a bill of civil, political, economic, and social rights for aliens who are granted refugee status in countries of refuge. The United States generally affords *all* aliens the rights required for refugees by the Protocol and Convention. Thus, the observation by a State Department spokesman in 1968 that "refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"³⁷ cannot be taken as a guarantee that ratification of the Protocol would have no effect on U.S. immigration law. Indeed, the observation did not even relate to immigration law, but to laws and policies concerning issues such as employment, religion, free speech, and cultural identity.³⁸ The point was that the civil and related rights enjoyed by all aliens in the United States satisfied the specific obligations due refugees under the Protocol.

The Senate was informed by a State Department spokesman also that the INA's deportation provisions could be administered in conformity with the Protocol, without the need for legislative amendments.³⁹ This statement left open the possibility that the Protocol might require changes in current immigration practice, but assumed that such changes could be achieved under the existing statute. The Secretary of State's words highlight this understanding of the Protocol's effect:

"[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This article is com-

³⁷ S. Exec. Rep. No. 14, *supra* note 36, at 4; see Br. Pet. 27.

³⁸ In a similar context, the President and Secretary of State remarked that accession "would not impinge adversely" on existing laws. S. Exec. K, *supra* note 36, at III, VII.

³⁹ S. Exec. Rep. No. 14, *supra* note 36, at 6.

*parable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. Section 1254, and it can be implemented within the administrative discretion provided by existing regulations."*⁴⁰

These statements do not support the proposition that the Senate approved the Protocol on the "express understanding"⁴¹ that it would not affect the INS approach to section 243(h) claims. Instead, the Senate was informed that article 33 would not require amendment of the INA because the relevant treaty provisions could be implemented administratively.

When the United States wanted to limit the effect of the Protocol on U.S. law, it knew how to do so unambiguously. The United States adopted two reservations to the Protocol, one relating to the taxation of nonresident aliens, and the other to residency requirements for social security benefits.⁴² The absence of any qualification on the United States' acceptance of article 33 stands in sharp contrast to these express limitations.

3. The statute should be construed to avoid a violation of U.S. treaty obligations.

As a treaty acceded to by the U.S. executive and ratified with the advice and consent of the Senate, the Protocol became, in 1968, the supreme law of the land.⁴³ It also, of course, gave rise to international obligations on the part of the United States to the other signatory na-

⁴⁰ S. Exec. K, *supra* note 36, at VIII (emphasis added).

⁴¹ Br. Pet. 25.

⁴² The United States ratified the Protocol subject to the reservations that (a) the United States would tax refugees who are not U.S. residents in accordance with its general rules applicable to nonresident aliens, notwithstanding article 29 of the Convention, which provides for "national" treatment, and (b) the Convention provision on national treatment of refugees with respect to social security would give way to a less favorable standard where the Social Security Act requires. S. Exec. Rep. No. 14, *supra* note 36, at 2.

⁴³ U.S. Const., art VI, cl. 2.

tions. If the Court were to construe the INA to require a greater evidentiary showing for refugee status than the treaty contemplates, a conflict would be generated between two coequal federal laws. And if the Court determined that the statute prevailed as a matter of domestic U.S. law, the implementation of the statute in a manner inconsistent with the treaty would involve the United States in a breach of its international obligations.⁴⁴

The courts have developed canons of construction to avoid such an undesirable result. When a treaty and a statute "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either" ⁴⁵ To that end, "a statute should, if possible, be construed in a manner consistent with treaty obligations" ⁴⁶ That is obviously possible here, where the relevant language of the treaty and statute are identical. The Court should construe section 243(h) to comport with article 33 of the Convention, by rejecting the Government's narrow approach to the implementation of the statute.

B. The 1980 Amendment to Section 243(h) Incorporated into U.S. Statutory Law the Treaty Prohibition Against the Forcible Return of Refugees.

U.S. immigration law has contained a "withholding of deportation" provision of some sort for over thirty years. Congress first enacted section 243(h) in 1952 as part of the original INA. That law authorized the Attorney General, in his discretion, to withhold the deportation of

⁴⁴ See generally *Restatement (Second) of Foreign Relations Law of the United States* §§ 141-45 (1965); H. Steiner & D. Vagts, *Transnational Legal Problems* 555-61 (2d ed. 1976).

⁴⁵ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

⁴⁶ *Diggs v. Schultz*, 470 F.2d 461, 466 (D.C. Cir.), cert. denied, 411 U.S. 931 (1972) (dictum); see *Restatement (Second) of Foreign Relations Law of the United States* § 145 comment b & reporter's note 1 (1965); H. Steiner & D. Vagts, *supra* note 44.

an alien if in his opinion the alien would be *physically* persecuted in the country of deportation.⁴⁷ Congress amended section 243(h) in 1965 by replacing "physical persecution" with "persecution on account of race, religion, or political opinion."⁴⁸ The discretionary nature of the Attorney General's authority remained unchanged.

In the Refugee Act of 1980,⁴⁹ Congress adopted the U.N. definition of "refugee,"⁵⁰ established for the first

⁴⁷ Immigration and Nationality Act, Pub. L. No. 414, ch. 477, § 243(h), 66 Stat. 163, 214 (1952) (amended 1965, 1980). Prior to enactment of the INA in 1952, the Internal Security Act of 1950 provided:

"No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010 (1950) (repealed 1952). When the immigration laws were revised by the INA in 1952, section 23 was repealed and reemerged in revised form as section 243(h) of the INA.

⁴⁸ INA Amendments of 1965, § 11, 79 Stat. 911, 918, 8 U.S.C. § 1253(h) (1976) (amended by Refugee Act of 1980, § 203(e), 8 U.S.C. § 1253(h) (Supp. IV 1980)).

⁴⁹ Pub. L. 96-212, 94 Stat. 102.

⁵⁰ In language substantially identical to that of the U.N. Convention, the 1980 Act defines a "refugee" as

"Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such a person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (Supp. IV 1980).

Prior to 1980, the INA contained a somewhat comparable provision, INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (repealed 1980), added by the INA Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965). That provision as enacted in 1965 created the "seventh preference" immigrant visa quota, authorizing the use of

time a rational system for admitting as immigrants refugees located abroad,⁵¹ and implemented programs for the resettlement of such refugees in this country.⁵² In addition, Congress expressly adopted the Convention and Protocol prohibition of *refoulement* by amending INA section 243(h) to provide:

"The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion."⁵³

up to 6% of the Eastern Hemisphere immigrant visa quota for the "conditional entry" of aliens fleeing communist or middle eastern countries on account of persecution or fear of persecution, or fleeing natural disaster. Subsequent legislation made seventh preference visas available regardless of an alien's hemisphere of origin. INA Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1976); Act of October 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978).

⁵¹ The Refugee Act created a special immigration category allocating visas for the admission of "refugees." 8 U.S.C. § 1157(c) (Supp. IV 1980). The Act fixed the refugee visa allocation at 50,000 each year for 1980, 1981, and 1982, subject to Presidential authority to lift the ceiling, after consulting with Congress, to cope with emergencies. After 1982, the annual refugee visa allocation is to be established by the President in consultation with Congress. Most of the INA's provisions disqualifying aliens as immigrants, such as those relating to labor certification, public charges, quota priority, documents, and literacy, are inapplicable to refugees. Moreover, the Attorney General may waive any other exclusionary ground that might otherwise bar a refugee, except the exclusion provisions relating to national security, former Nazis, and trafficking in narcotics.

⁵² See Pub. L. No. 96-212, 94 Stat. 102, titles II-IV.

⁵³ 8 U.S.C. § 1253(h)(1) (Supp. IV 1980). This amendment to section 243(h) made several significant changes in that provision. First, withholding was made mandatory if the elements of a claim were met. Second, Congress rewrote the section to reflect the *nonrefoulement* obligation as set forth in article 33 of the Refugee Convention. Third, withholding was extended to aliens deemed

Congress also added, in 1980, the first statutory basis in U.S. law for granting political asylum.⁸⁴ Political asylum provides another route for aliens who are within the United States to seek permission to stay on account of their well-founded fear of persecution. While a section 243(h) claim is made in a deportation or exclusion proceeding and decided by an immigration judge, political asylum may be sought from an INS district director outside the context of any such proceeding. In contrast to section 243(h) claims, a request for political asylum may be denied in the Government's discretion, even if a well-founded fear of persecution exists. A rejected asylum applicant may pursue his section 243(h) claim in a subsequent deportation or exclusion proceeding.

The legislative reports make clear that Congress modeled the Refugee Act's new definition of refugee on the U.N. definition. The legislative history also leaves no question about Congress' intent to adopt the Convention's rule of *nonrefoulement*. The Conference Committee statement provides, in full:

"ASYLUM AND WITHHOLDING OF DEPORTATION

"The Senate bill provided for withholding deportation of aliens to countries where they would face

not to have entered the United States, such as those apprehended at the border, whose right to remain is determined in exclusion proceedings, as well as to aliens deemed to have made an "entry," who are subject to deportation proceedings.

⁸⁴ Asylum regulations before the Refugee Act were promulgated under the Attorney General's general authority to administer the immigration laws under INA § 103(a). 8 U.S.C. § 1103(a) (1976). Section 208 of the INA, added by the Refugee Act, specifically directs the Attorney General to establish procedures for granting asylum to aliens, irrespective of status, who are physically present in the United States, at land borders, or at ports of entry. 8 U.S.C. § 1158 (Supp. IV 1980). To be eligible for asylum, which is granted in the Attorney General's or his delegate's discretion, an alien must be a "refugee" as defined by the Refugee Act.

persecution, unless their deportation would be permitted under the U.N. Convention and Protocol Relating to the Status of Refugees.

"The House amendment provided a similar withholding procedure unless any of four specific conditions (those set forth in the aforementioned international agreements) were met.

"The Conference substitute adopts the House provision *with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.* The Conferees direct the Attorney General to establish a new uniform asylum procedure under the provisions of this legislation."⁵⁵

There is no hint in the Conference Committee Report of a legislative finding that the amendment was considered purely cosmetic, and no endorsement of previous practice under section 243(h). Moreover, in presenting the Conference Committee Report to the Senate, Senator Kennedy, the chief Senate sponsor of the Refugee Act of 1980, stated that, "relative to the suspension of deportation, under Section 243(h) of the Immigration and Nationality Act, it is the intention of the Conferees that the *new* provisions of this Act shall be implemented consistent with the relevant provisions of the United Nations Convention and Protocol."⁵⁶ The legislators thus treated as new initiatives the addition of an entirely new statutory asylum provision *and* the amendment of the existing withholding of deportation provision to incorporate the mandatory *non-refoulement* obligation.⁵⁷

⁵⁵ S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980) (emphasis added).

⁵⁶ 126 Cong. Rec. S 1754 (1980) (emphasis added).

⁵⁷ The Government makes much of the observation in the 1979 report by the House Committee on the Judiciary on H.R. 2816 (the House bill that eventually became the Refugee Act of 1980) that, "[a]lthough [section 243(h)] has been held by court and adminis-

The provisions of and deliberations on the proposed Immigration Reform and Control Act of 1983⁵⁸ also strongly suggest that the Government's arguments are ill-founded. The bill, which has twice passed the Senate, provides that immigration judges shall use country profiles prepared by the Secretary of State "as general guidelines in making the asylum [or withholding of deportation] determination."⁵⁹ The Senate Report said with respect to this provision:

"The new section also provides that the Secretary of State shall, on a continuing basis and without reference to individual applications, make available to the

trative decisions to accord to aliens the protection required under article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention." H.R. Rep. No. 608, 96th Cong., 1st Sess. 18 (1979). *See* Br. Pet. 37-38. The Government also emphasizes the 1979 Senate Report on what became the new asylum provision: "The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the [Protocol and Convention]." S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979). *See* Br. Pet. 38-39. According to the Government, these comments demonstrate that Congress "evinced no intent to alter" section 243(h), Br. Pet. 36. Such a conclusion is unwarranted. For example, the statement that the section had been held to accord the protection required under article 33 but was being amended for purposes of clarity can reasonably be read as no more than a savings provision. The Committee may have intended to ensure that Congress' decision in 1980 to change section 243(h) would not be cited as evidence that aliens whose claims were decided under the old version of the statute had necessarily been denied the benefits of the Refugee Convention. To read the comment as the Government does is to overlook the subsequent legislative history, the statutory language Congress employed, and the international principle it adopted.

⁵⁸ *See* S. 529, 98th Cong., 1st Sess., 129 Cong. Rec. S. 6970-86 (May 18, 1983); S. Rep. No. 62, 98th Cong., 1st Sess. (1938) (Senate Judiciary Committee Report on S. 529).

⁵⁹ S. 529, § 124(a), 129 Cong. Rec. at S 6975. Section 124(b) provides that an application for withholding of deportation under section 243(h) shall be considered in accordance with the procedures for asylum applications.

Attorney General reports on the condition of human rights in all countries. These country profiles will provide to the immigration judge who adjudicates the asylum application the necessary information on the country where the applicant claims to fear persecution."⁶⁰

This approach is plainly inconsistent with the Government's contention that an alien must prove that he will be singled out for persecution.

Although the companion bill reported out by the House Judiciary Committee does not contain a similar provision,⁶¹ provisions in both the House and Senate bills for the training of those who decide asylum and withholding of deportation claims also suggest that Congress does not share the views advanced by the Government here. Under both bills, immigration judges are to receive special training in international law and relations.⁶² The House Report on this provision explained:

"Such special training should consist of detailed knowledge of the 1980 Refugee Act, country reports on human rights conditions published by the State Department, the United Nations handbook on refugee processing, and any other reputable sources of refugee or asylum information."⁶³

⁶⁰ S. Rep. No. 62, *supra* note 58, at 38 (emphasis added).

⁶¹ H.R. 1510, Rep. No. 115, Pt. I, 98th Cong., 1st Sess. (1983).

⁶² S. 529, § 124(a), *supra* note 58; H.R. 1510, Rep. No. 115, Pt. I, *supra* note 61, § 124(a).

⁶³ H.R. Rep. No. 115, Pt. I, 98th Cong., 1st Sess. 57 (1983). The Government quotes a passage appearing in this report and a 1982 House Report as support for its argument that Congress intended to make no changes in the standard for section 243(h) cases when it incorporated the provisions of the Refugee Convention into the INA in 1980. Br. Pet. 41 n.38. In pertinent part, the passage states:

"Some question has arisen as to whether the United States, by agreeing to the Protocol, intended to expand or modify the rights of aliens seeking asylum in the United States. The Com-

The new procedures proposed in the Immigration Reform and Control bill are designed to implement and improve administration of what the Senate and the relevant House Committee understand to be the principles underlying asylum, withholding of deportation, and *non-refoulement* in the 1980 Act and in the Convention and Protocol. The procedures and their legislative history cannot be squared with the notion that an individual must prove that he will be singled out for persecution in order to make out an asylum or section 243(h) claim.⁶⁴

mittee is convinced that nothing in present law, nor in [the proposed legislation], should be construed as providing less protection than the Protocol. That is, the Committee views the Protocol as creating no substantive or procedural rights not already existing either under current law or under the law as modified by the Committee Amendment. The Committee thus agrees with the holding in *Pierre v. United States* [547 F.2d 1281, 1288 (5th Cir.), *vacated and remanded*, 434 U.S. 962 (1977),] wherein it is stated that 'accession to the Protocol by the United States was neither intended to nor had the effect of substantially altering the statutory immigration scheme.'" H.R. Rep. No. 115, Pt. 1, *supra*, at 59; see H.R. Rep. No. 890, Pt. 1, 97th Cong., 2d Sess. 51 (1982).

That statement does not support the Government's position. The Committee said little more than that the law *after* the Refugee Act of 1980 was fully consistent with the Refugee Protocol, and that the Immigration Reform and Control bill would not change that consistency. The Committee's closing remark that accession to the Protocol did not "substantially" alter the "statutory immigration scheme" leaves open the issue here, which is whether that statutory scheme permitted before 1980—and requires since 1980—an administrative practice less restrictive than that advocated by the Government.

⁶⁴ In a key compromise concerning the Immigration Reform and Control bill, Senators Kennedy and Simpson and others agreed to judicial review provisions for asylum determinations. See 129 Cong. Rec. S 6937-52 (May 18, 1983) (statements of Sen. Kennedy and Sen. Simpson). In discussing the compromise, Senator Kennedy said:

"What I would do, Mr. President, is to ask unanimous consent to include at this point in the record . . . three rather dra-

C. In Any Event, There Is No Coherent Body of Practice Requiring the Evidentiary Showing the Government Proposes.

Contrary to the Government's assertions, the case law under section 243(h) neither constitutes a coherent body of practice nor suggests very much about the quality and quantity of evidence required under that statute. The courts in a number of cases have looked at the evidence in the record and found that it was so insufficient as to justify a denial of relief.⁶⁵ Conclusory statements by some courts that aliens failed to demonstrate a "clear probability" or other degree of likelihood of persecution fall far short of establishing a coherent body of practice that Congress should be deemed to have frozen into the statute. On their facts, the cases fail utterly to establish the Government's proposed rule that aliens must prove that they will be singled out, that subjective fear is unimportant, and that near-certainty of persecution must be proved.

One reason courts have resorted to conclusory phrases is that the evidence in many section 243(h) cases has

matic cases where an immigration judge ruled against a particular individual and because under the current law there are appeal procedures, they went up to the circuit court and the circuit court found for the individuals. I think any fair examination of those three cases would indicate that if those people had been deported they would not be alive today. So judicial [review] probably save[d] these three people from persecution."

129 Cong. Rec. at S 6940. Among the cases cited by Senator Kennedy as demonstrating proper results under existing law were this case and *Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982), where the court followed the decision of the Second Circuit in this case.

⁶⁵ See, e.g., *Dereoglu v. District Director*, No. 78 C 1106 (N.D. Ill. 1979) (slip op.); *Martineau v. INS*, 556 F.2d 306 (5th Cir. 1977); *Pereira-Diaz v. INS*, 551 F.2d 1149 (9th Cir. 1977); *Pierre v. United States*, supra note 63, 547 F.2d at 1289; *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Khalil v. District Director*, 457 F.2d 1276 (9th Cir. 1972); *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971).

been so inadequate as not to warrant thorough analysis. Such cases presented no occasion for courts to decide what types and quantity of evidence are required by section 243(h). In *Hamad v. INS*,⁶⁶ for example, the District of Columbia Circuit held that the petitioner had failed to meet the "burden of establishing the probability that he would be persecuted in Jordan"⁶⁷ where his proof consisted of testimony of his hostile encounter with a Jordanian military officer in a Virginia restaurant. In *Khalil v. District Director*,⁶⁸ the Ninth Circuit affirmed the denial of withholding of deportation on a record that contained evidence of little more than the petitioner's subjective fear of deportation. Neither these cases, nor others much like them, establish the evidentiary demands advocated by the Government. To the contrary, they are consistent on their facts with the standard set forth in this brief.⁶⁹

⁶⁶ 420 F.2d 645 (D.C. Cir. 1969).

⁶⁷ *Id.* at 647.

⁶⁸ 457 F.2d 1276 (9th Cir. 1972).

⁶⁹ See also *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977) (court affirmed denial of claim where alien produced no evidence other than copies of leaflets and pamphlets voicing opposition to the Iranian government, none of which mentioned his name or demonstrated his ownership; in view of his lack of evidence, alien urged the court to adopt a test based solely on his assertions of subjective fear).

In *re Dunar*, 14 I. & N. Dec. 310 (BIA 1973), discussed by the Government at Br. Pet. 28-29, 34, 47, was a careful effort to reconcile the pre-1980 version of section 243(h) with the Convention and Protocol. The decision is not apposite here. In *Dunar* the BIA read section 243(h) to include types of persecution that are specified in the Convention but that were not then set forth in the statute. The BIA also held that article 33's "threat to life or freedom" test was implemented by section 243(h)'s reference to "persecution." The Board reconciled the mandatory treaty rule of *nonrefoulement* with the then discretionary regime of section 243(h), noting that the

The government agencies charged with implementing the statute even today have no consistent view of section 243(h). Government officials acknowledge that the Department of State and INS do not share a unified view.⁷⁰ A recent statement by a State Department spokesman, for example, contrasts sharply with the position of the Government here that the 1980 Refugee Act wrought no change in the pre-1980 law.⁷¹ Testifying before Congress, the Assistant Secretary of State for Human Rights and Humanitarian Affairs stated, "[T]he Refugee Act of 1980 *radically revised* U.S. refugee and asylum law and procedures" ⁷² He said that "knowledge of con-

Attorney General had indicated that he would not exercise his discretion to deport an alien to a place of persecution.

The Board's ultimate conclusion, that accession to the Refugee Protocol did not override the Board's "clear probability" standard, is not inconsistent with the positions urged here. In holding that that verbal formula survived, the Board did not intimate that the formula entailed the restrictive position the Government advocates here with respect to the type and amount of evidence required. Moreover, subsequent to *Dunar* Congress enacted the Refugee Act of 1980, thus overruling any prior administrative practice inconsistent with the treaty.

The few decisions that contain language suggesting a need to prove singling out of the individual alien for persecution are, we submit, erroneous in that respect. See *Fleurinor v. INS*, 585 F.2d 129, 134 (5th Cir. 1978) (to establish withholding claim alien "would have to provide some evidence that the Haitian government remembers him"); *Zamora v. INS*, 534 F.2d 1055, 1058 (2d Cir. 1976) (immigration judge found that "'[n]othing presented establishes that the Philippine government has been or now is aware of respondents or has any interest, any adverse interest, in them'").

⁷⁰ See, e.g., *Hearings on Refugee Act Reauthorization*, *supra* note 11 (statement of Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, Department of Justice, at 5).

⁷¹ Br. Pet. 36-37.

⁷² *Hearings on Refugee Act Reauthorization*, *supra* note 11 (statement by Elliot Abrams, Assistant Secretary for Human Rights and Humanitarian Affairs, at 3) (emphasis added).

ditions in the applicant's country of origin is an important element in assessing the applicant's credibility and whether his fear may be considered 'well-founded.'"⁷³ Similarly, the Assistant Attorney General recently told a House Committee that "the determination whether an individual's fear of persecution is well-founded rests on whether the individual can convincingly show both that he is subjectively fearful and that his fear is objectively rational."⁷⁴ These views of "well-founded fear"—as a broad concept that turns on subjective fear as well as objective conditions in the country of origin—are distinctly different from the position taken in the Government's brief.⁷⁵ The uncertainty, both judicial and administrative, about the interpretation of section 243(h) belies the Government's assertion that there is a consistent and cohesive theory of "well-founded fear" that Congress adopted or to which this Court should give deference.⁷⁶

The Government's argument based on the case law is infirm for another reason. The cases decided under pre-

⁷³ *Id.* at 4.

⁷⁴ *Id.* (statement of Theodore B. Olson at 4).

⁷⁵ The INS itself has openly acknowledged its uncertainty in this area. In a study on asylum adjudication completed in December 1982, the INS posed the question: "[I]s the current law with regard to asylum adjudications workable?" In its own words, INS answered:

"We do not know the answer because INS was never able to implement fully the asylum provisions of the 1980 Refugee Act. For this most difficult, time-consuming, and politically controversial work, we neither trained our officers, developed comprehensive final regulations and operating instructions, [n]or gave priority to the effort."

Immigration and Naturalization Service, *Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service*, reprinted in 129 Cong. Rec. S 6939 (May 18, 1983).

⁷⁶ Br. Pet. 41-42; see *id.* at 25, 28-32.

1980 law construed a discretionary statute very different from the mandatory rule passed by Congress in 1980.⁷⁷ The first case in which a court approved the Government's use of a "clear probability" formula apparently was *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967). That decision and its progeny⁷⁸ do not necessarily stand for anything more than that, when the Attorney General had discretion to grant or deny withholding of deportation, he was entitled to require the petitioner to demonstrate a clear probability of persecution. *Lena* itself focused on the Attorney General's discretion:

"It is clear that the Attorney General employs stringent tests and restricts favorable exercise of his discretion to cases of clear probability of persecution of the particular individual petitioner. The Attorney General's course of conduct, however, shows consistency in the various cases. We cannot say that he has exercised his discretion in an arbitrary manner."⁷⁹

Other courts have been less careful.⁸⁰ Their inconsistency further undermines the Government's contention that a

⁷⁷ The Government dismisses as a "peculiar suggestion" the Second Circuit's holding that standards developed under a discretionary statute may be inapposite in implementing a mandatory statute. Br. Pet. 47. To the contrary, the court recognized a distinction that has been lost on some other courts: that the clear probability formula was not based on the substantive *nonrefoulement* principle, but on the discretion afforded the Attorney General under the pre-1980 version of section 243(h).

⁷⁸ *Hyppolite v. INS*, 382 F.2d 98, 100 (7th Cir. 1967); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Kashani v. INS*, supra note 69; *Cisternas-Estay v. INS*, 531 F.2d 155, 159 (3d Cir. 1976).

⁷⁹ 379 F.2d at 538.

⁸⁰ Compare *Hyppolite v. INS*, supra note 78 (court properly stated the question as whether the Attorney General's refusal to exercise his discretion to withhold deportation was arbitrary) with

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No. 82-973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

—against—

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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No. 82-973

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

-against-

PREDRAG STEVIC

PRELIMINARY STATEMENT

This brief is offered by the Lawyers Committee for International Human Rights as an amicus curiae in this matter. Since 1978, the Lawyers Committee has monitored proposed legislation and regulations in the refugee and asylum areas, has engaged in litigation in

significant cases in those areas, and has assisted in providing legal representation for numerous applicants for political asylum in the United States from countries all over the world. The Lawyers Committee is dedicated to ensuring that refugees and asylum seekers receive just and equitable consideration under domestic and international law. The parties have consented in writing to the submission of this brief.

SUMMARY OF ARGUMENT

Prior to the ratification in 1968 of the United Nations Protocol relating to the Status of Refugees there was no comprehensive asylum law in the United States. Rather, three different procedures were used to give refuge to aliens in the United States: withholding of deportation, conditional entry, and admission under the Attorney General's parole power.

In 1968 the United States acceded to the Protocol and bound itself to apply a uniform, non-ideological refugee eligibility standard. Under the standard, a refugee must establish that he or she was persecuted or has a "well-founded fear of persecution" in his or her home country. Contrary to petitioner's suggestion, this standard

differs substantiantially from the previous standard for withholding of deportation under the Immigration and Nationality Act of 1952, which was interpreted to require an alien to show a "clear probability of persecution." In particular, the new standard emphasizes the character and state of mind of the individual.

The new standard, however, was not applied in practice by the agency. Consequently, contrary to petitioner's characterization, Congress became concerned about the failure to implement the Protocol standard and enacted the Refugee Act of 1980, incorporating and emphasizing the uniform, non-ideological standard.

The agency, however, has continued to adhere to the obsolescent "clear probability" standard in violation

of the Refugee Act.

The Court, moreover, owes no deference to the agency's "misinterpretation" since it is in violation of the Refugee Act.

Finally, this matter is moot in view of the fact that the agency has recently indicated that it is applying the new standard.

ARGUMENT

Point I

Because INS and the Courts failed to implement the United Nations Protocol relating to the Status of Refugees, Congress enacted clarifying legislation in the Refugee Act of 1980.

- A. Prior to the ratification of the Protocol in 1968 there was no comprehensive asylum law in the United States.

"The United States traditionally has had one of the most generous and compassionate refugee programs of any nation."1/ Nonetheless, the history of asylum and refugee law in this country prior to 1968 is essentially a saga of reaction to crises as they arose^{2/} and of

1/ Brief for Petitioner, Immigration and Naturalization Service, at 7.

2/ See e.g., The Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009 (1948). This legislation was enacted to confront the ongoing
(footnote continued)

ideological and geographical bias.^{3/} Before 1968, there were three procedures, each with a different standard, under which aliens could seek refuge in the United States.

1) Withholding of deportation

Under the Immigration and Nationality Act of 1952^{4/} the Attorney General was authorized to "withhold deportation of any alien ... to any country in which in his opinion the alien would be subject to physical persecution

(footnote continued)
tragedy of mass migration in the wake of World War II.

^{3/} See, e.g., The Displaced Persons Act, Amendments of 1950, Pub. L. No. 81-555, 64 Stat. 219 (1950); H. R. Rep. No. 581, 81st Cong., 1st Sess., 15 (1949) (acknowledging the use of the law to accept political dissidents from Communist countries).

^{4/} Pub. L. No. 414, 66 Stat. 163 (current version at 8 U.S.C. § 1101) [hereinafter 1952 Act].

...."5/ Faced with this discretionary authority to decline to deport an alien from the United States, INS developed a limiting policy to restrict "the favorable exercise of discretion to cases 'of clear probability of persecution of the particular individual petitioner'...."

5/ 1952 Act, § 243(h), 66 Stat. at 214 (current version at 8 U.S.C. § 1253(h)). Prior to 1965, an alien had to establish that he or she would be subject to "physical persecution" to be eligible for withholding of deportation. Congress amended the withholding provision in 1965 replacing "physical persecution" with "persecution on account of race, religion or political opinion." Immigration and Nationality Act, 1965 Amendments. Pub. L. No. 89-236, § 11, 79 Stat. 911, 918. [hereinafter 1965 amendments] (current version at 8 U.S.C. § 1253(h)) This change was considered by Congress to be in harmony with the 1951 United Nations Convention Relating to the Status of Refugees, even though the United States had not formally acceded to the Convention. See In re Tan, 12 I&N Dec. 564 (BIA 1967).

In re Joseph, 13 I&N Dec. 70, (BIA 1968)
[citation omitted]; In re Tan, 12 I&N Dec.
564, 568 (BIA 1967); Lena v. INS, 379 F.2d
536, 538 (7th Cir. 1967).^{6/}

"Clear probability", further-
more, is a stringent standard.^{7/} See,
e.g., In re Tan, [voluminous documenta-
tion of abuse of ethnic Chinese in

^{6/} Unless otherwise indicated, the ad-
ministrative cases cited herein have
been designated as "precedents" by
the Board of Immigration Appeals of
the Department of Justice. 8 C.F.R.
§ 3.1(g) (1983). The Board is a
creature of regulation and a dele-
gate of the Attorney General. 8
C.F.R. § 3.1(a) (1983).

^{7/} It is misleading to assert (INS
Brief at 25), that the Second Cir-
cuit "'attributed a stringency to the
phrase 'clear probability' that is
inconsistent with [its] own observa-
tions in Cheng Kai Fu v. INS,'" 386
F.2d 750 (2d Cir.), cert. denied,
390 U.S. 1003 (1967). Cheng con-
cerned the rejection of a motion
to reopen deportation proceedings,
and in deciding that the alien had
failed to show even "some evidence"
(footnote continued)

Indonesia, letters from relatives, and an attack on the family business ruled insufficient]; In re Kojoory, 12 I&N Dec. 215, 217 [Iranian president of anti-Shah student organization denied withholding despite findings of "no doubt" that alien was "prominently involved" in political activities in the United States, and that it was "likely" that he had been so identified by the government of Iran].8/

(footnote continued)

of potential persecution, the court did not hold that "some evidence" would satisfy the burden of showing a "clear probability" of persecution.

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See also Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), modified, sub nom., Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). In that case, the district court found evidence of systematic and extensive persecution throughout the Haitian cases reviewed, yet not one applicant had met the "clear probability" standard. For example, one woman's father had been killed by the Ton

(footnote continued)

The application of this limiting principle was reviewable only for abuse of discretion. Where "the Attorney General's course of conduct shows consistency in the various cases," his ungenerous interpretation of the law was deemed insufficient cause to hold that "he has exercised his discretion in an arbitrary manner." Lena v. INS, 379 F.2d at 538.

2) Conditional Entry Status

The second procedure, conditional entry,^{9/} was enacted in 1965 and concerned the admission of refugees from overseas. The INS could grant this status to aliens:

(footnote continued)

Ton Macoutes, who had come for her just after she had fled. Another woman had been jailed after the murder of both her husband and her son. 503 F. Supp. at 474-510.

^{9/} 1965 Amendments, § 3, 79 Stat. 913 (repealed at 94 Stat. 107).

who satisf[ied] an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution on account of race, religion, or political opinion they [had] fled (I) from any Communist or Communist-dominated country or area, or (II) from any country in the Middle East, and (ii) [were] unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) [were] not nationals of the countries or areas in which their application for conditional entry is made....

1965 Amendments, § 3, 79 Stat. 913 (repealed at 94 Stat. 107). There was a numerical ceiling on admissions, and relief was strictly limited by ideology and geographic location.^{10/}

Judicial review was ordinarily precluded, since most of the eligibility

^{10/} See 8 C.F.R. § 235.9(a)(1983), which limited the countries in which conditional entry visas could be processed to Austria, Belgium, France, Germany, Greece, Hong Kong, Italy and Lebanon.

determinations were made abroad and few aliens from Communist or Middle-Eastern countries had been able to come to the United States.^{11/} While the precedents are sparse, it is apparent that the conditional entry standard was more lenient than the withholding standard. See Cheng Fu Sheng v. Barber, 269 F.2d 497, 499 (9th Cir. 1959) [construing the term "fear of persecution" in the unrelated Refugee Relief Act of 1953 as "in sharp contrast" to the stringent withholding of deportation provision]. See also In re Tan, 12 I&N Dec. at 569-70; In re Adamska, 12 I&N Dec. 201, 202 (BIA 1967) [holding conditional

^{11/} The only reported cases prior to 1968 are In re Adamska, 12 I&N Dec. 201 (BIA 1967) [Polish visitor]; In re Lalian, 12 I&N Dec. 124 (BIA 1967) [Iranian visitor]; In re Frisch, 12 I&N Dec. 40 (BIA 1967) [Yugoslavian student].

entry to be "substantially broader" than the pre-1965 withholding.]^{12/}

3) Attorney General Parole Power

In 1952, the Attorney General was granted authority to "parole" aliens temporarily into the country "for emergent reasons or for reasons deemed strictly in the public interest." 1952 Act, § 212(d)(5), 66 Stat. at 188 (current version at 8 U.S.C. § 1182(d)(5)(A)). This third procedure was also used to admit refugees from overseas. In contrast to conditional entry, there were no numerical limitations. In contrast to withholding, there were no ideological or geographic limitations. In practice, however, as the following table shows, the parole power was

^{12/} See In re Ugricic, 14 I&N Dec. 384, 385-86 (BIA 1972), in which conditional entry was found to require but "good reason to fear persecution."

used almost exclusively to admit those fleeing communism.

PRE-1968 USE OF PAROLE POWER^{13/}

<u>Non-Communist</u>	<u>Total Authorized</u>
Europe (1956)	925
<u>Communist</u>	
Hungary (1957)	32,000
Cuba (1960-67)	185,487
Chinese-Hong Kong (1962)	15,000
USSR (1963)	<u>224</u>
	<u>232,711</u>

- B. The United States acceded in 1968 to the United Nations Protocol relating to the Status of Refugees and bound itself to apply a uniform, non-ideological refugee eligibility standard.

^{13/} Compiled from P.W. Schmidt, Fall 1979 INS Reporter, 1-3; World Refugee Crisis: The International Community's Response, Report to the Committee on the Judiciary, 96th Cong., 1st Sess., 213 (1979).

In 1968 the United States became a party to the 1967 United Nations Protocol relating to the Status of Refugees (hereinafter Protocol).^{14/} The United States thereby bound itself to apply the provisions of the Protocol,^{15/} which defines the term "refugee" as a person who

owing to well-founded fear of being persecuted for reasons of race,

^{14/} The Protocol relating to the Status of Refugees was opened for signature on January 31, 1967. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N. T.S. 267. It was ratified by the United States on October 4, 1968. 114 Cong. Rec. 29,607 (1968).

^{15/} S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 1 (1968); Letter of Submittal, Message from the President of the United States transmitting the Protocol relating to the Status of Refugees, S. Exec. K., 90th Cong., 2d Sess., v (1968); see In re Dunar, 14 I&N Dec. 310, 313, (BIA 1973).

religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Protocol, Art. I § 2.^{16/}

The sponsors of the Protocol, and expert witnesses who appeared before the Senate Foreign Relations Committee, were unequivocal in their assurances that ratification of the document "would not

^{16/} As the brief of amicus American Immigration Lawyers Association demonstrates (point D (2)(d)), aside from the United States, there are numerous other signatory nations which adhere to the Protocol standard.

impinge adversely upon the Federal and State laws of this country."17/

In particular, Eleanor McDowell of the Office of the Legal Advisor of the Department of State testified before the Foreign Relations Committee on the subject of the Protocol, and stated that "existing regulations which have to do with deportation would permit the Attorney General sufficient flexibility to enforce the provisions of this convention which are not presently contained in the Immigration and Nationality Act." S. Exec. Rep. No.

17/ 114 Cong. Rec. 29,391 (1968) [Statement of Sen. Mansfield]; accord, 114 Cong. Rec. 27,757 (1968) [Message from the President transmitting the Protocol]; id. at 27,758 [Letter of submittal from the Department of State]; 114 Cong. Rec. 27,844 (1968) [Statement of Laurence A. Dawson of the Department of State].

14, 90th Cong., 2d Sess., 8 (1968).

- C. The inquiry under the "well-founded fear" standard differs substantially from that under the "clear probability" standard.

In contrast to the "clear probability" standard, the "well-founded fear" standard introduces to the inquiry the character and state of mind of the individual applicant. See Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva 1979) (hereinafter Handbook) at 11-13, ¶¶ 37-41, 45.^{18/} Fear must be reasonable under the

^{18/} The Second Circuit referred below to the United Nations High Commissioners' Handbook as a distillation of the "High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject." Stevic

(footnote continued)

circumstances. However, even "[e]xaggerated fear ... may be well-founded" if the applicant's interpretation of the situation, given his background, is reasonable. Handbook at 12, ¶ 41.

Generally a claimant's fear will also have external indicia. Under the Protocol standard, circumstantial evidence is relevant and admissible, and is to be evaluated in terms of "the personal and family background of the applicant, his membership of a particular

(footnote continued)

v. Sava, 678 F.2d 401, 406 (2d Cir. 1982). The Board of Immigration Appeals has itself treated the Handbook as a significant source of guidance as to the meaning of the Protocol. In re Frentescu, Int. Dec. No. 2906 at 4 (BIA June 23, 1982); In re Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980). The pertinent provisions of the Handbook appear in an appendix submitted herewith.

racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences" Handbook at 12, ¶ 41 [emphasis supplied].

Thus, under the "well-founded fear" standard, "[d]etermination of refugee status will. . .primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin." Handbook at 11, ¶ 37. The conditions in the country in question may be relevant as external confirming evidence of the applicant's fear.19/

19/ The substantive refugee standard should be distinguished from the burden of proof and its allocation, which is on the individual applicant (8 C.F.R. § 208.5 (1983)) presumably by a preponderance of the evidence.

D. The Protocol standard was not applied in practice.

1) Withholding of deportation

The withholding of deportation provision, as amended in 1965,^{20/} reads:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of his race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

The considerable flexibility permitted under the withholding provision could have accommodated the new refugee standard. However, while the Board of

^{20/} See note 5 supra. 1965 Amendments to Act, § 3, 79 Stat. 918, amending § 243(h) of 1952 Act, 66 Stat. at 214 (current version at 8 U.S.C. § 1253(h)).

Immigration Appeals limited negative exercises of discretion^{21/}, it retained the "clear probability" standard. In re Joseph, 13 I&N Dec. at 72.

Furthermore, there was no consensus among the courts that reviewed withholding of deportation determinations after accession to the Protocol about the appropriate refugee eligibility standard.

^{21/} The Board explained In re Dunar, 14 I&N Dec. at 322, that "[w]hile the section 243(h) cases also speak in terms of the Attorney General's discretion, we know of none in which a finding has been made that the alien has established the clear probability that he will be persecuted and in which section 243(h) withholding has nevertheless been denied in the exercise of administrative discretion." But see In re Liao, 11 I&N Dec. 113, 1.7-19 (BIA 1965) [held no abuse of administrative discretion to deny withholding of deportation despite immigration judges reference to "considerable evidence" to support respondent's claim of likelihood of persecution upon return to Formosa].

Some used the "well-founded fear" standard. Pereira-Diaz v. INS, 551 F.2d 1149, 1154 (9th Cir. 1977); Zamora v. INS, 534 F.2d 1055, 1058 (2d Cir. 1976); Paul v. INS, 521 F.2d 194, 200 (5th Cir. 1975). Others used the "clear probability" standard. Martineau v. INS, 556 F. 306, 307 (5th Cir. 1977); Pierre v. United States, 547 F.2d 1281, 1289 (5th Cir. 1977), vacated and remanded to consider mootness, 434 U.S. 962 (1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir. 1976); Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971).

Still others used different standards. Khalil v. District Director, 457 F.2d 1276, 1277 n.3 (9th Cir. 1972) ["would be persecuted"]; Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977) ["probable persecution"]; Daniel v. INS, 528

F.2d 1278, 1279 (5th Cir. 1976);
Shkukani v. INS, 435 F.2d 1378, 1380 (8th
Cir.), cert. denied, 403 U.S. 920 (1971);
Kovac v. INS, 407 F.2d 102, 105 (9th Cir.
1969) ["probability of persecution"];
Gena v. INS, 424 F.2d 227, 232 (5th Cir.
1970) ["likely" persecution].

Occasionally, the courts
addressed the issue squarely. The
Seventh Circuit opined that "the 'well-
founded fear' standard in the Protocol
and the 'clear probability' standard
which this court has engrafted onto
section 243(h) will in practice con-
verge." Kashani v. INS, 547 F.2d 376,
379 (7th Cir. 1977). The Fifth Circuit
explained, however, that the Protocol
standard, as viewed by the Board,
"suggest[ed] at least a slight diminution

in the alien's burden of proof"

Coriolan v. INS, 559 F.2d 993, 997 n. 8
(5th Cir. 1977).

2) The parole power

The Attorney General's parole power was also sufficiently flexible to accommodate the ideologically neutral Protocol standard. In practice, however, as the following table shows, ideology continued to animate decision-making.

USE OF PAROLE POWER, 1968-80 22/

<u>Non-Communist</u>	<u>Total Authorized</u>
Latin America (excl. Cuba) (1975-78)	4,400
Uganda (1972-73)	1,750
Lebanese (1978)	<u>1,000</u>
	<u>7,150</u>

22/ See note 13 supra.

Communist

Cuba (1968-78)	232,666
USSR (1970-77)	17,200
USSR & E. Europe (1978-79)	61,924
Czechoslovakia (1970)	6,500
Indochina (1975-79)	<u>290,075</u>
	<u>608,365</u>

That 7,150 non-Communists were admitted under the parole power shows that the Attorney General could have admitted refugees regardless of ideology. The percentage of non-Communists actually admitted, however, remained small.23/

23/ In 1972, the Department of State recognized that accession to the Protocol required implementing procedures and adherence to the new refugee standard. At that time, regulations were issued permitting aliens to seek sanctuary in the United States and abroad. 37 Fed. Reg. 3447 (1972). See also 39 Fed. Reg. 41832 (1974) which established (footnote continued)

- E. Congress became concerned about the failure to implement the Protocol.

After 1968 it became increasingly apparent to legislators that the INS was still using practices and procedures that frustrated implementation of the Protocol and that were inconsistent with its generous underlying humanitarian philosophy. Consistent with the United States' leadership in showing compassion for the persecuted, Congress called for legislation to ensure implementation of the Protocol.

As soon as the Protocol was ratified, members of Congress realized that the definition of refugee would have

(footnote continued)
a formal asylum procedure for the INS that also recognized the applicability of the Protocol.

to be broadened.^{24/} This need was highlighted by the so-called Kurdica Affair in 1970, in which a Soviet sailor who had jumped ship was returned to his vessel without an opportunity to seek asylum.^{25/}

Legislators introduced bills to require INS to conform its standards and practices to those of the Protocol, and the pressure for change was constant from 1973 until the passage of the 1980 Act.^{26/} Bills considered in 1976 by the

^{24/} See, e.g., S.3202, introduced into the Senate, 115 Cong. Rec. S. 36,965-66 (1969).

^{25/} See Congressional Research Service of the Library of Congress, Review of United States Refugee Resettlement Programs and Policies, 96th Cong., 2d Sess., 16 (1980).

^{26/} In 1973 Senator Kennedy introduced S.2643, referred to the Committee on the Judiciary, 119 Cong. Rec. 35,734 (1973). The definition of the term (footnote continued)

(footnote continued)

"refugee" was patterned closely on the Protocol definition. Id. at 35,735, 35,737.

That same year in the House, very extensive hearings were held on H.R. 981. See Western Hemisphere Immigration, Hearings before House Subcomm. No. 1 of the Comm. on on the Judiciary, 93d Cong., 1st Sess. (1973). Witnesses noted with evident gratification the usage of the Protocol terminology. Id. at 249-50, 258, 304, 306, 326; see also 119 Cong. Rec. H. 31,360 (1973) [Statement of rep. Eilberg introducing the bill on the House floor]; 119 Cong. Rec. 31,454-55 (1973).

In 1975, in introducing S.2405, Senator Kennedy said, "the act of 1965 was only the beginning of an important task It failed to resolve a number of issues relating to immigration It was generally recognized at the time that additional legislation would soon be needed. And this failure to act over the past decade has ... been detrimental to fulfilling the intent of the 1965 Act" 121 Cong. Rec. 29,947 (1975). The bill proposed to excise the 1965 ideological biases and to include the U.N. refugee definition.

House had contained the "well-founded fear" refugee standard.^{27/} Indeed, they were the subject of most of the hearings, and it is significant that representatives of the Departments of State and Justice recognized the difference between the stringent "clear probability" standard and the Protocol standard. The Justice Department, while supportive of

^{27/} Most of the hearings concerned H.R. 367 and H.R. 981, both of which brought the definition of refugee in line with the Protocol. See Western Hemisphere Immigration, Hearings on H.R. 367, H.R. 981, and H.R. 10323, before the House Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, 94th Cong., 1st and 2d Sess. (1976) [hereinafter 1976 Hearings]. The eventual 1976 amendments changed little, however. They were essentially a compromise after sponsors of more comprehensive legislation failed to gain the required support.

the basic tenets of this [refugee] provision ... believe[d] that the 'well-founded fear of persecution' should be limited to the 'well-founded fear of persecution in the opinion of the Attorney General.' The Department believe[d] that ... [otherwise] it would be entirely subjective with the alien claiming refugee status whether his fear of being persecuted was well-founded [or not].

Western Hemisphere Immigration, Hearings on H.R. 367, H.R. 91, and H.R. 10323, before the Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, U.S. House of Representatives, 94th Cong., 1st and 2d Sess. (1976) at 18 [hereinafter 1976 Hearings].

The refugee standard was raised specifically in hearings in 1977. Congresswoman Holtzman, ultimately the co-sponsor of the 1980 legislation, stated her concern with the INS' narrow reading of the law:

MS. HOLTZMAN. ... I wonder if you have any concern that ... we ought to ... spell out -- but not in an overly detailed manner -- the kinds of procedures that should be used.

The reason I raise this is because when Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch. I am concerned because I think the definition of refugee in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution, we don't specify how that well-founded fear is to be ascertained

Hearings on H.R. 3056, Policy and Procedures for the Admission of Refugees into the United States, before the House Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary, 95th Cong., 1st Sess., 126-7 (1977) [emphasis supplied]. Congresswoman Holtzman, as a lawyer, appreciated that a stringent application can

eviscerate the most generous legislation.28/

In 1978, Congressman Eilberg, expressing Congress' growing impatience with the INS' failure to fulfill the spirit of the Protocol, stated:

For years, we have received assurances ... from the Justice Department ... that criteria, guidelines, and regulations would be promulgated ... so we would not have to go through the necessity of moving legislation. Yet this has never taken place.

Hearings on the Admission of Refugees into the United States, II, before the Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, 95th Cong., 1st and 2d Sess., 15 (1978).

28/ H.R. 3056 is specifically cited in the legislative history of the 1980 Act as the genesis of that law. See H.R. Rep. No. 608, 96th Cong., 1st Sess., 7 (1979).

Thus, the stage was set for comprehensive legislation.

F. The Refugee Act of 1980 emphasized the uniform, non-ideological eligibility standard for refugee status.

The Refugee Act of 1980^{29/} established a standard for uniform and non-ideological refugee eligibility. Congress intended this new standard to be compatible with the humanitarian traditions and international obligations of the United States. Central to the Act was a statutory definition of "refugee" which conformed to that of the Protocol. A refugee was defined as

... any person who is outside any country of such person's nationality or, in the case of

^{29/} Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter the 1980 Act].

a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion....

Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A)(1982). This standard is used to determine claims for asylum under § 208(a) of the Act, 8 U.S.C. § 1158(a)(1982), and claims for withholding of deportation under § 243(h) of the Act, 8 U.S.C. § 1253(h) (1982).^{30/}

It is beyond dispute that Congress intended the definition of

^{30/} See 8 C.F.R. § 208.3(b)(1983) Asylum requests "shall also be considered as requests for withholding exclusion or deportation pursuant to Section 243(h) of the Act"].

"refugee" in the 1980 Act to conform to that in the Protocol. See, e.g., 126 Cong. Rec. 3,757 (1980) [Statement of Senator Kennedy: "The new definition makes our law conform to the United Nations Convention and Protocol"]. During hearings, the derivation of the term was often mentioned and never questioned. This intent was emphasized in the report of the Senate Judiciary Committee and debate on the Senate floor. S. Rep. 256, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. 23,231 (1979).

Similarly, throughout House consideration of the bill, references were made to "the fundamental change under the legislation ... the replacing of the existing definition of refugee with the definition which appears in the U.N.

Convention and Protocol" Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess., 27 (1979) [hereinafter 1979 House Hearings]; see also id. at 43, 168, 169, 248, 251, 280, 284, 291, 357, 361, 383, 393; 125 Cong. Rec. 35,813-26 (1979).

The purpose of changing the definition was not only to excise ideological bias from immigration law, but also to "facilitate bringing refugees into this country," since only a well-founded fear of persecution would have to be established. 1979 House Hearings, supra, at 169 and 284; Briefing on the Growing Refugee Problem, Hearing Before the Subcomm. on International Organizations of the Comm. on Foreign Affairs, 96th Cong.,

1st Sess., 4-5 (1979).

Congress emphasized its concern over the intransigence of INS in the past and expressed its intention to monitor compliance in the future: "The Committee intends to monitor closely the Attorney General's implementation of the [asylum] section so as to insure the rights of those it seeks to protect." H.R. Rep. No. 608, 96th Cong., 1st Sess., 18 (1979).

- G. INS continued to follow the prior standard despite the enactment of the Refugee Act.

Even though Congress emphasized the uniform, non-ideological standard through the enactment of the Refugee Act of 1980, INS continued to follow the "clear probability" standard. See, e.g., In re McMullen, 17 I&N Dec. 542 (BIA 1980), rev'd, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981). In McMullen, the

Board denied withholding despite confirming documentary evidence of the applicant's defection from the Provisional Irish Republican Army ("PIRA"), and the nature and activities of the PIRA, finding under the "clear probability" standard that the alien had not demonstrated that the Irish government could not control the PIRA. The Court of Appeals reversed, explaining that the standard applied had been virtually "impossible" to satisfy. 658 F.2d at 1319. See also Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983), petition for cert filed, No. 82-1649 (April 7, 1983), [withholding denied by the Board where the applicant had been involved in a student political organization, a member of which had been killed, and the alien had been linked to the killing; and

where three expert witnesses testified in support of applicant's claim.^{31/}

H. Adherence to the "clear probability" standard violates the Refugee Act

Courts have long recognized a "need for special judicial deference to congressional policy choices in the immigration context." Fiallo v. Bell, 430 U.S. 787, 793 (1977). This principle requires respect for legislative intent. "By contrast, the power of the INS is more circumscribed ... [and it] must conform its actions to the statutes"

^{31/} In connection with the petition for rehearing below, INS submitted several recent unpublished decisions of the Board which used the "clear probability" standard. In re Fernandez-Blanco, A23-225-100 (BIA Feb. 18, 1982); In re Balboa-Pena, A23-221-155 (BIA Feb. 11, 1982) In re Bernal-Torres, A23-225-865 (BIA Feb. 10, 1982); In re Mendez-Valdes, A23-217-202 (BIA Dec. 20, 1981).

Haitian Refugee Center v. Civiletti,
503 F. Supp. at 452.

The Court should reject administrative constructions that are inconsistent with the mandate of Congress or that frustrate the policy that Congress sought to implement. S.E.C. v. Sloan, 436 U.S. 103, 118 (1978); see also Morton v. Ruiz, 415 U.S. 199, 237 (1974). The Court should thus require the administrative authorities to "honor the clear meaning of a statute as revealed by its language, purpose and history." International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 556 n.20 (1979). Anything less would be an endorsement of INS' impermissible interference with Congress' legislative function under the Constitution. See INS v. Chadha, 51 U.S.L.W. 4907, 4919 (U.S. June 23, 1983)

(Powell, J., concurring).

A fair reading of the legislative history shows that the 1980 Refugee Act was designed to adopt the Protocol's "well-founded fear" standard. As the Second Circuit recognized below, the Act must be followed.

Point II

The Court, as the final authority on issues of statutory construction, is obliged to review independently the legal standard under Section 243(h), and need not defer to INS' interpretation.

In reviewing administrative action, a "court shall decide all relevant questions of law ...," 5 U.S.C. § 706 (1977), and must do so with a critical perspective independent of the agency's interpretation. Although the court may grant a presumption of validity to an agency's application of law where

the agency has statutory discretion or expertise peculiar to the area, the reviewing court is the ultimate authority in issues of statutory construction. See Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981). The agency's construction of a statute is "only one input in the interpretational equation." Zuber v. Allen, 396 U.S. 168, 192 (1969).

The analysis of the "well-founded fear" standard in the 1980 Act does not require deference to any specialized knowledge of INS. See Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 270 (1960). Rather, the legal standard to be applied requires reference to an international agreement. A knowledge of the rules of statutory construction, a sensitivity for foreign affairs

implications, and an attentiveness to the policies underlying the law are required. All of these are matters uniquely within the purview of the court. See Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983); Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 n. 27 reh'g denied, 430 U.S. 976 (1977).

Courts have traditionally looked to signs of congressional action or inaction for determining the weight to be accorded the agency's interpretation of a statute. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 382-385 (1981); Saxbe v. Bustos, 419 U.S. 65, 74-79 (1974). If Congress has either not reconsidered the statutory language, or has reenacted the statute without modification, courts frequently assume that the legislature

acquiesces in the agency's interpretation. NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

In this case, Congress modified the agency's governing statute -- a modification showing that the agency's construction was wrong. The court is not obliged to stand aside and rubber stamp the administrative misinterpretation. See Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 745-6 (1973); NLRB v. Brown, 380 U.S. 278, 291 (1965).

The 1980 legislation provided a statutory foundation for "our national commitment to human rights and humanitarian concerns" S. Rep. No. 256,

96th Cong., 1st Sess., 1 (1979).^{32/} This generous purpose requires implementation of the "well-founded fear" standard.

Point III

This matter is moot.

In connection with the petition for rehearing below, INS submitted several recent unpublished decisions of the Board which tested the applicants' claims under the following formulation:

[A]n alien must demonstrate a clear probability that he will be persecuted if returned to his country or a well-founded fear of such persecution [citations omitted] [emphasis supplied].

^{32/} See also IV K.C. Davis, Administrative Law Treatise, § 30.09 at 241 (1958) ["[C]ourts, not the agencies, are comparatively the experts in ... most analysis of legislative history...."].

In re Amador-Aranda, A24-704-992, (BIA April 8, 1982); In re Rurale-Terry, A23-220-248 (BIA March 18, 1982); In re Araujo-Rodriguez, A23-217-764 (BIA March 12, 1982); In re Chao-Estrada, A24-793-918 (BIA March 9, 1982). If the agency has conformed its practice and now adheres to the standard under the Protocol and Refugee Act, then this claim has "lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." Hall v. Beals, 396 U.S. 45, 48 (1969); see, Powell v. McCormack, 395 U.S. 486, 496 (1969).

"[T]he burden of demonstrating mootness 'is a heavy one'." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) [citation omitted]. The adoption

in practice of the new refugee standard would satisfy the burden: Stevic will no longer have "a legally cognizable interest in the final determination of the underlying question of fact and law."

Id. See also DeFunis v. Odegaard, 416 U.S. 312 (1974).^{33/}

^{33/} Congress is also considering legislation that would render this case moot, the so-called Simpson-Mazzoli bill (S.529, H.R. 1510). The Senate version (S.529) passed the Senate on May 18, 1983. The House version (H.R. 1510) was reported out of the Judiciary Committee on May 13, 1983, and may be considered this year. Mr. Stevic would be presumptively eligible under the legalization provisions of either the Senate or the House versions of the legislation, and he would no longer be subject to deportation at that time. His claim would definitely have "lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." Hall v. Beals, 396 U.S. 45, 48 (1969). Under the legislation Stevic would become a permanent resident of the United States. He could hope for no more as a refugee.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted, 34/

Lawyers Committee for
International Human Rights
by Arthur C. Helton

August 1983

34/ Counsel wishes to acknowledge the assistance of Deborah Gieringer, Anne Goldstein, Karen McCreary, and Clive Stafford Smith (law students) in the preparation of this brief.

APPENDIX

Handbook on Procedures and Criteria for
Determining Refugee Status

37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.

38. To the element of fear -- a state of mind and a subjective condition -- is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted" -- for the reasons stated -- by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective

element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences -- in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

AUG 29 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-973

**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER,

v.

PREDRAG STEVIC,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

Interest of Amicus Curiae

The National Immigration Project of the National Lawyers Guild, Inc. is a non-profit organization of lawyers, legal and community workers dedicated to the protection of immigrants' rights in the United States. Since its inception in 1971, the National Immigration Project has taken special interest in the representation of applicants for political asylum. Project members throughout the country have provided accessible and zealous counsel to individual applicants. In addition, the Project has developed manuals on the practical aspects of asylum practice, asylum documentation materials, and skills seminars on refugees and asylees.

The National Immigration Project is particularly interested in the outcome of this case because the standard of proof in asylum

cases affects not only the practice of Project members, but also the lives of the clients for whom the Project exists. The National Immigration Project is pleased to have the twenty-two undersigned organizations (described in Appendix A) join in this brief to advocate the affirmance of the well-founded fear standard in keeping with the letter and spirit of the Refugee Act of 1980.

American Friends Service Committee, New England
Regional Office

Asian American Legal Defense and Education Fund
(AALDEF)

Asian Law Caucus, Inc.

Bay Area Immigrant and Refugee Rights Project
Center for Immigrants' Rights (CIR)

Central American Refugee Center (CARECEN)

Central American Refugee Defense Fund (CARDF)

Chicago Religious Task Force on Central America
(CRTFCA)

El Rescate

El Salvador Lawyers Committee of Denver

Haitian Refugee Center (HRC)

Justice and Peace Office of the Archdiocese of Denver

La Raza Legal Alliance

Lutheran Immigration and Refugee Service of the
Lutheran Council in the United States of America

Mexican American Legal Defense and Education Fund
(MALDEF)

National Center for Immigrants' Rights, Inc.

National Ministries of the American Baptist Churches
in the U.S.A.

Salvador Refugee Coalition of Denver

Tucson Ecumenical Council Task Force for
Central America

Unitarian Universalist Service Committee (UUSC)

Washington Association of Churches

Willamette Valley Immigration Project

Summary of Argument

As presented to this Court, the issue is whether the Refugee Act of 1980, (the "Act"), Pub. L. No. 96-112, 94 Stat. 102 *et seq.*, lessened the burden of proof imposed upon an applicant for the withholding of deportation under §243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). The government argues that Congress intended no change in the burden of proof simply because the standard applied prior to the Act, i.e., that an applicant must prove a "clear probability" of persecution is equivalent to proof of a "well-founded fear" of persecution as required by the Act itself. Thus, the argument goes, the label which is pinned to the applicant's burden of proof is not important.

It is the purpose of this brief, however, to show that labels are important in this case, and that only the "well-founded fear" language adequately, clearly, and correctly describes the substance of the applicant's burden. The Solicitor General may understand that, *as interpreted in some cases*, there are no significant differences between a "clear probability" and a "well founded fear" of persecution. But that is not true of immigration officers who must administer this highly sensitive law on a day-to-day basis, who tend to think that a "clear probability" requires a level of proof distinctly more arduous than that called for by a "well-founded fear" of persecution, and who have been confused by a series of administrative decisions which seem to compel the applicant to prove everything from the prospect of actual persecution, to the "clear probability" of persecution, to a "realistic likelihood" of persecution, or that he or she would be "singled out" for persecution, or is the individual "target" of potential persecutors.

It is also the purpose of this brief, therefore, to ask the Court to disapprove of language such as "clear probability" as not being descriptive of the applicant's true burden of proof, and to provide a plain, easy to understand, easy to administer description of what the burden or proof really is. Such a description should be substantially as follows: The applicant must prove a fear of

persecution that is reasonable or realistic, meaning that the fear must be supported by some credible evidence. While mere conjecture is insufficient, it is asking too much for an applicant to prove that he or she "would be" persecuted or that persecution is more probable or more likely to occur than not. The life and death implications of an asylum application cannot be a matter of odds. Similarly, while it is appropriate to ask the applicant to prove a fear which is particularized, it is wrong to expect an applicant to prove that he or she would be "singled out" or is an individual "target" of persecutors, in the sense that persecutors are "looking for" the applicant individually.

The discussion which follows will show that the formulation proposed here flows from the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577. It is, therefore, the burden intended by the Refugee Act of 1980 because the Act was a manifestation of congressional intent to conform United States law with the U.N. Protocol. Moreover, the substance of the burden of proof advocated here is not inconsistent with any judicial opinion on the subject. It is inconsistent only with administrative formulations that would impose a burden so onerous that Congress could not have intended to adopt it either before or after the Refugee Act of 1980.

ARGUMENT

I. THE WELL-FOUNDED FEAR STANDARD OF THE UNITED NATIONS PROTOCOL REQUIRES NOTHING MORE THAN CREDIBLE EVIDENCE OF A REASONABLE FEAR OF PERSECUTION.

The government correctly notes that the issue in this case "concerns the meaning of the phrase 'well-founded fear of persecution' in the Refugee Act of 1980." Brief for the Petitioner at 20. It also correctly acknowledges that because the Act was expressly intended to conform U.S. law to our international obligations under the U.N. Protocol, construction of the phrase "well founded fear of persecution" must begin with the construction placed on that phrase as it first appeared in the Protocol itself. Brief for the Petitioner at 22.

The intent of Congress to conform U.S. law to the U.N. Protocol could not be clearer.¹ Thus, when Congress enacted the Refugee Act of 1980, it amended Sec. 243(h), 8 U.S.C. 1253(h), to reflect the mandatory nature of the United States' obligations pursuant to Article 33 of the U.N. Protocol.² This amendment was deemed desirable, "for the sake of clarity" and "necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements." H. Rep. 96-608, p. 18 (1979). The amended language was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." Conf. Rep. on the Refugee Act of 1980, No. 96-781 p. 20 (1980).

Further, Congress eliminated the geographical and ideological restrictions previously applicable to conditional entrant refugees, former §203(a)(7), 8 U.S.C. 1153(a)(7), and provided a new non-discriminatory definition of the term refugee. Compare Article 1 of the U.N. Protocol with §101(a)(42), 8 U.S.C.

¹ Of course, the United States had acceded to the Protocol in 1968 and, as a result, it might be assumed that asylum applicants in the United States were accorded the same rights guaranteed by the Protocol, even before the 1980 Act. Nevertheless, by enacting the Refugee Act of 1980, Congress obviously found a need to emphasize its intent to make the Protocol applicable to the United States.

The issue as to whether or not the U.N. Protocol is a self-executing treaty has never been clearly resolved. Cf. *Matter of Laurenzano, et al.*, 13 I&N Dec. 636, 639 (BIA 1970) (not self-executing); *Pierre v. United States*, 547 F.2d 1281, 1288 (5th Cir. 1977) (no new rights or entitlements vested by operation of the Protocol); *Bertrand v. Sava*, 684 F.2d 204, 218, 219 (2nd Cir. 1982) (not self-executing). *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 365 fn. 15 (C.D. CA 1982) (issue expressly left undecided by court); *Matter of Dunar*, 14 I&N Dec. 310, 313 (BIA 1973) (Protocol is self-executing); Leon Wilde "The Dilemma of the Refugee: His Standard for Relief" 1983, *Cardozo Law Review* 353-379 (Protocol is self-executing); see also *Ming v. Marks*, 367 F.Supp. 673, 677 (S.D. N.Y. 1973), *aff'd on opinion below*, 505 F.2d 1170, 1172 (2d Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 911, 95 S.Ct. 1564, 43 L.Ed.2d 776 (1975).

² The new mandatory language of §243(h) in the Refugee Act of 1980 removed the absolute discretion formerly vested with the Attorney General. See *McMullen v. INS*, 658 F.2d 1312, 1316 (9th Cir. 1981). Cf. *Marroquin-Manriquez v. INS*, 669 F.2d 129, 133 fn. 5 (3rd Cir. 1983), *pet. for cert. pending*, No. 82-1649 (filed April 17, 1983).

1101(a)(42) of the Immigration and Nationality Act. This new definition "will finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee'." Conf. Rep. No. 96-781 p. 19 (1980). See also H. Rep. No. 96-608 pp. 9, 17 (1979), and S. Rep. No. 96-256 p. 4 (1979). Finally, the enlarged basis of persecution to include "nationality" and "membership in a particular social group" in both the new definition of refugee and withholding of deportation provision represented movement towards conformity with the U.N. Protocol.

Conformity with the U.N. Protocol being the intent of Congress, it only follows that the burden of proof imposed upon asylum or refugee applicants should be consistent with that intended by the Protocol. About the intent of the Protocol there can be little doubt. According to the drafters of that document,

The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has either been actually a victim of persecution or *can show good reason why he fears persecution*. (emphasis added).³

More recently, the United Nations High Commissioner for Refugees (UNHCR)⁴ characterized the burden of proof in the following way:

37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by

³ United Nations Economic and Social Committee, *Report of the Ad Hoc Committee on Statelessness and Related Problems* at 39 (Feb. 17, 1950) (E/1618; E/AC 32/5).

⁴ The UNHCR is charged with the responsibility of supervising the application of the provisions of the U.N. Convention and Protocol relating to the Status of Refugees. See Article 35 of the 1951 U.N. Convention and Article II of the 1967 U.N. Protocol.

The UNHCR has published the *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Geneva, 1979). The BIA has accepted the *Handbook* as a significant source of guidance as to the meaning of the Protocol. *Matter of Rodriguez-Palma*, 17 I & N Dec. 485 (BIA 1980).

categories . . . by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in his country of origin.

38. To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. *The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.* (emphasis added).

43. These considerations *need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded.* The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g., a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well-founded". (emphasis added).⁵

⁵ Paragraphs 37, 38 and 43 of the *U.N. Handbook*. See also paragraphs 39-42 of the *U.N. Handbook* and Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 66-67 (1981).

The *U.N. Handbook* is not cited here for the proposition that Congress was guided by it specifically when enacting the Refugee Act of 1980. Rather, it is cited only for the purpose of establishing what the U.N. itself says the burden of proof constitutes. Of course, each country may decide whether a particular applicant has sustained his or her burden. Brief of the Petitioner at 33. But this fact has no bearing on the substantive nature of the burden itself.

The Protocol's burden of proof, therefore, emphasizes the fear of the applicant and is satisfied if the applicant is able to prove by credible evidence that his fear of persecution is reasonable. The UNHCR indicates that the proper focus of an asylum examiner's inquiry should be on the reasonableness of the fear, not on a balancing of probabilities.⁶ Since decisions on asylum have the potential for determining the life or death of a person, an asylum decision cannot be made to depend on the odds of persecution, especially in light of the difficulty a refugee has in producing tangible proof of future persecution.

Significantly, under U.N. interpretation, an applicant need not show that he has already personally attracted the attention of his country, nor demonstrate a likelihood that he will be "singled out" for persecution. Rather,

What has happened to others in similar circumstances, for instance, may be sufficient evidence of a well-founded fear or persecution . . . a person who has not been persecuted simply because he has not yet attracted the attention of his government, need not wait until detection and persecution before he can claim refugee status . . . Moreover, a person *need not be singled out for persecution in order to be a refugee* . . . (emphasis added). Letter dated January, 1982 from the Washington Liaison Office, UNHCR, attached as Appendix B. (B-8, B-9)

Finally, both the Immigration and Naturalization Service (INS) and Department of State profess to follow the very same guide lines. Operations Instruction 208.4 of the INS provides:

Burden of Proof

The burden is on the asylum applicant to establish . . . a well-founded fear of persecution . . . This means that the applicant must have actually been persecuted, or can show *good reason why he/she fears persecution*. (emphasis added).

⁶ See letter dated January, 1982 from the Washington Liaison Office of the UNHCR attached as Appendix B. (B-7 and B-10)

The State Department's "Refugee Processing Guidelines" (April 18, 1981) at p. 4 provides:

The applicant need not establish that persecution occurred in the past or that persecution would actually occur if he returned to his home country. Rather, it is only necessary that the interviewer conclude that a fear of persecution exists and is well-founded.

Thus, proving a well-founded fear of persecution requires that an applicant demonstrate a reasonable basis to fear persecution. The reasonableness of the fear is evaluated by considering a totality of the circumstances, including the objective background situation in the country of origin, the subjective perceptions of the applicant, and the credibility of the applicant. An asylum applicant should not be required to prove that he will be persecuted or that persecution is more probable than not. It is enough if the applicant submits evidence, which fairly evaluated, would lead a reasonable person to believe that he might be persecuted, i.e., that persecution is reasonably possible.

If immigration officials were only interpreting their own "good reason" to fear instruction to mean what it plainly says, this case would present no controversy. Instead, they have come to think of "good reason" to fear as requiring a higher level of proof. As the discussion which follows will show, they have been misled in that respect by indiscriminate and confusing descriptions of the burden of proof found in decisions of the Board of Immigration Appeals.

II. DECISIONS OF THE BOARD OF IMMIGRATION APPEALS IMPLY THAT THE "CLEAR PROBABILITY" STANDARD IS MORE ARDUOUS THAN THE "WELL-FOUNDED FEAR" STANDARD.

The Board of Immigration Appeals, which sets the standard for all immigration officials,⁷ decided after the United States acceded to the U.N. Protocol in 1968, that the "clear probability" standard which had been imposed prior to acces-

⁷ 8 C.F.R. 3.1(g) provides that "selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues."

sion amounted to the same thing as the "well-founded fear" standard of the Protocol. *Matter of Dunar*, 14 I.&N. Dec. 310 (BIA 1973).

As to the substantive nature of the burden, the Board said:

Some sort of a showing must be made and this can ordinarily be done only by objective evidence. The claimant's own testimony as to the facts will sometimes be all that is available; but the crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted. The burden of coming forward with the requisite evidence is obviously the claimant's. And if all he can show is that there is a merely conjectural possibility of persecution, his fear can hardly be characterized as 'well-founded.' " 14 I.&N. Dec. at 319.

Taken in context, it seems apparent that when the Board spoke of proving a "realistic likelihood" of persecution, it used that term as the equivalent of a "well-founded fear" and did not mean to imply that an applicant must prove that persecution is more likely or more probable than not. Rather, in the Board's view, the applicant must prove, on the basis of credible evidence, that his or her fear of persecution is realistic or reasonable.

Unfortunately, the Board itself has not always followed its own precedent as established by *Dunar*. And, as will be noted more fully in the next section of this Brief, its failure to do so has led immigration officials to apply a standard which is in fact more arduous than the "realistic likelihood" or "well-founded fear" standard of *Dunar*.

For example, in *Matter of McMullen*, 17 I&N Dec. 542, *rev'd on other grounds*, *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981), the Board totally abandoned references to proving either a "realistic likelihood" or a "well-founded fear" of persecution, but reverted instead to requiring proof of actual persecution or of a "clear probability" of persecution. Aside from the labels used by the Board, moreover, it is readily apparent from the facts of the case and the evidence offered by McMullen, that the Board

was not concerned at all by the realistic or reasonable nature of the fears which McMullen expressed. Instead, the Board demanded proof that McMullen would be targeted for retribution by the Provisional Irish Republican Army were he to be deported to England and that the British government could not protect him from such retribution. The "clear probability" standard, as employed by the Board in *McMullen*, was thus plainly more demanding than the "well-founded fear" standard of the Protocol as interpreted in *Dunar*.

In other cases also, the Board has called for proof of a clear probability of persecution rather than for proof only of a reasonable fear of persecution. Thus in *Matter of Ramirez-Rivero*, 18 I.&N. Dec. __, Interim Decision 2884 (BIA 1981), the Board declared that the applicant "must demonstrate a clear probability that he will be so persecuted if returned to his country." There is no reference to proof of a reasonable or realistic fear.

In *Matter of Portales*, 18 I.&N. Dec. __, Interim Decision 2905 (BIA 1982), the Board phrased the applicant's burden in the alternative; that is, the Board said an applicant "must demonstrate a clear probability that he will be persecuted if returned to his country or a well-founded fear of such persecution." The obvious implication of phrasing the burden in alternatives is that one is different from the other. Yet the Board went on to analyze the evidence only in terms of whether the applicants "will be persecuted," not whether they had a realistic or reasonable fear of persecution.

In *Matter of Salim*, 18 I.&N. Dec. __, Interim Decision 2922 (BIA 1982), the Board phrased the burden somewhat differently when it declared "An applicant must present objective evidence that he has a well-founded fear that he is likely to be singled out for persecution...."

Finally, in *Matter of Sibrun*, 18 I.&N. Dec. __, Interim Decision 2932 (BIA 1982), the Board said an applicant

"must demonstrate a likelihood that he individually will be singled out and subjected to persecution."⁸

Of course, in some of the foregoing cases, the applicant's evidence would have been insufficient to prove even a reasonable fear and so the Board was not necessarily concerned with measuring the evidence against the reasonable fear standard. Nevertheless, the continual use by the Board of such phrases as "a clear probability" or "singling out" for persecution plainly implies in everyday usage that the applicant must prove something more than a reasonable or realistic fear of persecution.

A. The Board's Requirement That an Applicant Show a Clear Probability That He Would Be "Singled Out" for Persecution Has Placed an Impermissibly Strenuous Gloss on Proving a Well-Founded Fear of Persecution.

A standard which imposes upon the applicant a burden of proving more than a reasonable fear of persecution frustrates the intent of Congress which was to enact a humanitarian asylum law that would be administered in an evenhanded way and which was meant to give all asylum applicants a fair chance to prove their claims.

Compelling applicants to prove more than a reasonable or realistic fear of persecution is not fair because it makes their burden all but impossible to sustain in most cases. This is so because an applicant who is not well-known is simply not going to have evidence of being "singled out" for persecution in a particular country. Refugees do not carry such evidence with them when they flee a particular country and they do not have access to such evidence when they are in the United States.

⁸ The Board has frequently cited *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), cert. den. 390 U.S. 1003, for the proposition that an asylum applicant must prove that he would be "singled out" for persecution, as if potential persecutors are waiting to pounce on him. Actually, all *Cheng Kai Fu* stands for is the proposition that an asylum applicant's fear must be particularized as to him in the sense that his fear must be more specific than any generalized fears of the population at large.

The difficulty refugees fleeing persecution have in supporting their claims has been recognized by the UNHCR. The *U.N. Handbook* provides:

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary proof, and cases in which an applicant can provide evidence of all his statements will be an exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

Congress was very concerned over the traditional politicized nature of the Executive practice in the asylum area.⁹ Therefore, in order to control the Executive's use of political considerations, a non-discriminatory definition of refugee was adopted which, it was hoped, would result in fair and equal treatment for all asylum applicants. This has not proved to be the case in practice. For, as interpreted daily by immigration officers, the Board's "clear probability" standard sets the level of proof necessary so high that it allows the government to comfortably reject applicants to whom it does not wish to grant asylum for ideological or foreign policy reasons, thus re-introducing the double standard

⁹ Anker & Posner (Note 5), See pp. 41, 46, 48, 63.

into asylum law which the new refugee definition sought to eliminate. This is candidly admitted in an internal study of asylum applications made by the INS itself.¹⁰ As that study noted:

In some cases, different levels of proof are required of different asylum applicants. In other words, certain nationalities appear to benefit from presumptive status while others do not.

For example, for an El Salvadoran national to receive a favorable asylum advisory opinion, he or she must have "a classic textbook case." On the other hand, BHRHA sometimes recommends favorable action where the applicant cannot meet the individual well-founded fear of persecution test. This happened in December 1981 a week after martial law was declared in Poland. Seven Polish crewmen jumped ship and applied for asylum in Alaska. Even before seeing the asylum applications, a State Department official said, "We're going to approve them". All the applications, in the view of INS senior officials, were extremely weak. In one instance, the crewman said the reason he feared returning to Poland was that he once attended a Solidarity rally (he was one of the more than 100,000 participants at the rally). The crewman had never been a member of Solidarity, never participated in any political activity, etc. His claim was approved within forty-eight hours.

Although the Refugee Act abolished the country of national origin test for refugee/asylee status, for foreign policy or other reasons the criterion may still be overriding. It is unclear, however, what the statutory basis for such a determination is.

INS Asylum Study, p. 59.

¹⁰ See "Asylum Adjudications: An Evolving Concept and Responsibility for the Immigration and Naturalization Service" INS, Wash. D.C., June & December, 1982 ("INS Asylum Study"). Excerpts of this 93-page report have been introduced into the Congressional Record by Senator Edward Kennedy and have appeared in the press. See Cong. Rec. May 4, 1983, p. 56035, and *The Boston Globe*, p. 2, May 9, 1983.

As a result, in cases which the government chooses to oppose, an applicant who may have a bona fide fear of persecution is left with an almost insurmountable burden of producing highly individualized evidence which is often simply not available.

On the other hand, the government admits refugees on a wholesale basis from communist countries, with the exception of Yugoslavia,¹¹ without ever demanding such proof,¹² thus transforming a facially neutral law into an instrument of foreign policy. Contrary to the intent of Congress,¹³ this policy has had particularly devastating effects for refugees fleeing totalitarian governments which may be political "friends" of the United States.

Simply put, the Board's requirement that an applicant show a clear probability that he would be singled out for persecution by his government has placed an impermissibly strenuous gloss on proving a "well-founded fear" of persecution. It has led the INS to require an applicant to prove that he is the "target" of government persecution. See *Almirol v. INS*, 550 F.Supp. 253, 256 (N.D. CA 1982). This is an unfair and onerous burden to ask of a person seeking asylum and as such, frustrates the intent of Congress.

¹¹ Note, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, 7 N.Y.U. Rev. of L. And Soc. Change 107, 108, 124 (1978).

¹² David A. Martin, "The Refugee Act of 1980: Its Past and Future," 1982 *Michigan Yearbook of International Legal Studies* (New York: Clark Boardman Company, Ltd., 1982), p. 112.

¹³ "[T]he Committee intends to emphasize that the plight of the refugees themselves, as opposed to the national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States." H. Rep. No. 96-608, p. 13 (1979).

See also, *Briefing on the Growing Refugee Problem: Implications for International Organizations: Hearing Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 21 (1979) (remarks of Dick Clark, U.S. Coordinator for Refugee Affairs and Ambassador-at-Large) (passage of the Refugee Act "would make all people—regardless of their ideology, regardless of their geography—eligible for the [refugee] program"); S. Rep. No. 96-256, p. 1 (1979); H.R. Rep. No. 96-608, p. 13 (1979); 125 Cong. Rec. 23240 (1979) (remarks of Sen. Boschwitz) ("[i]f our commitment to help desperate, homeless people is sincere, we must be willing to help all in need of assistance despite their ideologies or countries of origin").

B. *Judicial Decisions Do Not Support the Board's Interpretation of the "Clear Probability" Standard.*

At the time Congress was considering the Refugee Act of 1980, the administrative and judicial decisions indicated that the substance of an applicant's burden was the same whether described as a "clear probability" or a "well-founded fear" of persecution. See *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977); *Matter of Dunar*, 14 I&N Dec. 310 (BIA 1973). It is therefore not surprising that according to the Refugee Act's legislative history: "[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." S. Rep. No. 96-256, p. 9 (1979). Nevertheless, the substance of the standard has rarely been discussed by the courts.

One exception is *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977), where the court rejected Kashani's assertion of a fear of persecution in Iran because he had submitted no objective evidence whatsoever. The court held that the "clear probability" standard of §243(h) and the "well-founded fear" standard of Article 33 of the U.N. Protocol were, in effect, equivalent because under both laws, the burden is on the applicant to come forward with some objective evidence to substantiate his asserted fear and elevate his claim from the realm of mere conjecture. 547 F.2d at 379. In fact, the court founded its standard on the Ad Hoc U.N. Report previously cited at fn. 3 of this brief. The court found no need to discuss the burden of proof further because Kashani's claim was based only on mere conjecture.

Other courts have muddied the waters somewhat by simply labeling the applicant's burden in various ways without further explanation. Sometimes the claimant had to show that he "would be"¹⁴ persecuted. In other cases, he had to prove a "clear probability"¹⁵ or a "likelihood"¹⁶ of persecution.

¹⁴ *Hosseinmardi v. INS*, 405 F.2d 25, 28 (9th Cir. 1968).

¹⁵ *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2nd Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Cisternas-Estay v. INS*, 531 F.2d 155, 159 (3rd Cir. 1976).

¹⁶ *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

Despite these different formulations of the standard, an analysis of the cases reveals a common thread. The courts have consistently rejected claims which relied solely on the naked assertion of fear. Generally, the courts have required some objective evidence which lends credence to an applicant's subjective fear of persecution in order to demonstrate that the applicant has a bona fide and reasonable basis to fear persecution.

Thus in *Moghanian v. U.S. Department of Justice*, 577 F.2d 141 (9th Cir. 1978), the court refused to reverse the denial of a §243(h) application because the only evidence of a fear of persecution he presented was "his undocumented claim that when he was a child other children were rude to him and that as a member of a religious minority he is apprehensive of ill treatment in his native land." 577 F.2d at 142.

In *Pereira-Diaz v. INS*, 551 F.2d 1149 (9th Cir. 1977) the court reached a similar conclusion because the petitioner had presented "essentially undocumented statements of belief" that he would be persecuted by communists in Portugal. 551 F.2d at 1154. See also *Gena v. INS*, 424 F.2d 227, 233 (5th Cir. 1970).

And in *Khalil v. District Director of INS*, 457 F.2d 1276 (9th Cir. 1972), the evidence consisted only of statements by the applicant and a witness asserting their belief without more that the applicant would be persecuted. The denial of her application too was affirmed.

In other words, in none of the foregoing cases did the claimant present any objective evidence to support his asserted fear of persecution. In this respect, *Khalil* is instructive. Said the court:

No factual support which might have demonstrated the *reasonableness* of this belief was offered; hence the INS was not clearly wrong in discounting the conclusory statements of danger and determining that Khalil had failed to sustain her burden of proof. 457 F.2d at 1278. (emphasis added)

The lesson is plain. If Khalil had presented reasonable and objective evidence to support her fear of persecution, the outcome

might have been different. None of the foregoing cases, or any of the judicial decisions which have used the term "clear probability," have required an individual to produce evidence that he would be "singled out" for persecution in the sense that he has already come to the attention of potential persecutors. These courts have only been looking for some objective evidence to corroborate the applicant's subjective fear in order to determine if the applicant had a "well-founded" or reasonable fear of persecution.

III. THE BOARD'S CHARACTERIZATION OF THE BURDEN OF PROOF AS REQUIRING A CLEAR PROBABILITY OF PERSECUTION HAS LED IMMIGRATION OFFICERS TO REQUIRE MORE THAN PROOF OF A REASONABLE FEAR OF PERSECUTION.

Immigration officers have been given precious few guidelines on which to make their asylum determinations, and the indiscriminate use of terms like "clear probability" or "singling out" only add to their confusion. These officers give the words "clear probability" their ordinary meaning. To them, as it would to most people, the label "clear probability" means the applicant must clearly and definitely establish that he or she is probably going to be persecuted. This is plainly more than proving a reasonable fear of persecution which is all the U.N. Protocol, and presumably U.S. law, was meant to require.

The label "clear probability" misleads officers by focusing their attention exclusively on a need for highly individualized objective proof, and ignores the subjective component of the "well-founded fear" analysis which, according to the *U.N. Handbook*, is an important element in the evaluation of an asylum claim. It also approaches a degree of certainty which is impossible to demonstrate in all but a few cases.

Immigration officers have described their dilemma in applying the appropriate burden of proof in the following way:

"We can't make a decision solely from the evidence presented because most people can't meet the strict stan-

dards . . . I never ask a person anything. I just look and see if the person belongs to a nationality group that everyone agrees are refugees like the Poles."

—INS examiner, INS Asylum Study, p. 53

"The 'clear probability' standard in my estimation is too high a standard, both in theory and in practice. In theory, it comes too close to 'beyond a reasonable doubt.' In practice, it means that unless you can present *Time* magazine articles on your own treatment, or State or the CIA has taken you under their wing, you may as well hang it up."

—INS attorney, INS Asylum Study, p. 53

Admittedly, the "clear probability" standard is extremely difficult to meet. "If we used that all the time," said a district director, "no one would be given asylum."

INS Asylum Study, p. 54.

Obviously, if immigration officers are equating the "clear probability" standard with the "reasonable doubt" standard of criminal law, they can hardly be applying a "well-founded fear" standard which asks them to decide only whether the evidence establishes a reasonable and credible fear of persecution.

The problem is readily acknowledged in the internal "INS Asylum Study":

What is an appropriate evidentiary standard for deciding an asylum claim? The Service requires that there be a "clear probability." At present, there are few guidelines to enable examiners to apply the standard uniformly in each district, sometimes resulting in one district or officer rejecting a claim that another officer or district would accept. In one instance, the brother was granted asylum; the sister was denied. Both applications, and the proof presented, were almost identical.

INS Asylum Study, p. 54.

As noted earlier, while the Solicitor General understands that a close and careful analysis of the cases may support his view that a "clear probability" and "well-founded fear" boil down to the same thing, that is not the way ordinary immigration officers understand these terms. In their eyes, there is a distinct difference between the two formulations. And because they see the "clear probability" standard as imposing a more arduous burden than the U.N. Protocol's "well-founded fear" standard, clarification by this Court is essential.

Conclusion

Both the U.N. Protocol and the Refugee Act of 1980 require an asylum applicant to demonstrate a "well-founded fear" of persecution. The language of the statute itself is appropriate to describe the burden of proof. The continued usage of terms like a "clear probability," etc., has only contributed to confusion and uncertainty regarding the meaning of the law.

It is submitted that if an applicant comes forward with objective evidence which gives credence to his own personal fear of persecution, he has met his burden. In other words, an applicant must show good reason why he fears persecution, thus giving meaning to all three words of the phrase "well-founded fear."

By requiring an individual to prove a "clear probability" of being "singled out" for persecution, the Board of Immigration Appeals has created an impermissibly strenuous burden for refugees to bear. This heavy burden frustrates Congress' purpose in enacting the Refugee Act of 1980, and it has proven to be virtually impossible to meet for many asylum seekers with bona fide fears of persecution.

Only this Court, it would seem, can provide immigration officers with the guidelines they obviously need to act upon asylum applications in a fair and reasonable way. As noted frequently in this brief, labels other than "well-founded fear" tend to mislead

the officers to require proof of more than a reasonable fear of persecution when they should be looking only for credible evidence that the applicant's fear of persecution is real and reasonable.

Although the views expressed here differ somewhat from the court below, we believe the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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*National Immigration Project of
the National Lawyers Guild, Inc.*

ADDENDUM

Appendix A

The twenty-one organizations described below join in this brief to advocate the affirmance of the well-founded fear standard in political asylum cases. The diversity of these groups reflects the broad-based commitment to bring United States law into full compliance with the United Nations Protocol Relating to the Status of Refugees.

The AMERICAN FRIENDS SERVICE COMMITTEE, NEW ENGLAND REGIONAL OFFICE, maintains a Refugee Program which assists Central American and Haitian women living in Boston to address the health, parenting, family and employment issues affecting their lives.

The ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (AALDEF) is a non-profit corporation established in 1974 under the laws of the States of California and New York. It was formed to protect the civil rights of Asian Americans throughout the nation through the prosecution of lawsuits and the dissemination of public information.

The ASIAN LAW CAUCUS, INC., is a community law organization serving the Bay Area since 1972 with offices in Oakland and San Francisco Chinatown. The Caucus has represented immigrants over the last 11 years, and currently represents individuals seeking political asylum in the United States.

The BAY AREA IMMIGRANT AND REFUGEE RIGHTS PROJECT is a special project of the San Francisco Lawyers' Committee for Urban Affairs. The Lawyers' Committee is the Northern California affiliate of the national Lawyers' Committee for Civil Rights Under Law. The Immigrant and Refugee Rights Project is involved extensively with the recruitment and train-

ing of attorneys willing to provide *pro bono* representation to political asylum applicants. The Project is dedicated to ensuring through domestic and international laws that the rights of persons seeking asylum are protected.

The CENTER FOR IMMIGRANTS' RIGHTS (CIR) is a legal and educational organization working with New York's immigrant communities. In particular, it has a special project which provides both direct representation and legislative advocacy on behalf of Central American refugees.

The CENTRAL AMERICAN REFUGEE CENTER (CARECEN) provides emergency immigration assistance to Central American refugees in the Washington, D.C. area. A non-profit organization founded in 1981, CARECEN has a current caseload of over 500 asylum cases.

The CENTRAL AMERICAN REFUGEE DEFENSE FUND (CARDF) grew out of test case litigation which is still being conducted on behalf of Salvadoran refugees. Founded in 1981 by co-directors Marc Van Der Hout and Carolyn Patty Blum, CARDF also coordinates a legal network of Central American refugee defense practitioners.

The CHICAGO RELIGIOUS TASK FORCE ON CENTRAL AMERICA (CRTFCA) is an inter-faith organization composed of over 300 Chicago-area residents and a variety of human rights and religious organizations. Founded in January 1981 to organize people of all religious persuasions to respond to the suffering poor of Central America, CRTFCA has as one of its major goals the attainment of legal status for Salvadoran and Guatemalan refugees in the United States.

EL RESCATE is a refugee relief project designed to provide legal, social and educational assistance to displaced persons from Central America residing in the United States, and primarily in Southern California.

The EL SALVADOR LAWYERS COMMITTEE OF DENVER represents Salvadorans seeking political asylum before the Immigration and Naturalization Service on a *pro bono* basis. It is of extreme importance to their legal representation that a proper and realistic burden of proof be established for the courts to follow.

The HAITIAN REFUGEE CENTER (HRC) in Miami is run by and for the benefit of Haitian refugees who seek asylum in the United States. HRC has successfully protected the Constitutional, statutory and international law rights of Haitian refugees through federal class action litigation. In addition, it provides indigent Haitian refugees with food, clothing, shelter, education and hope.

The JUSTICE AND PEACE OFFICE OF THE ARCHDIOCESE OF DENVER works weekly with Salvadoran refugees in the Denver area. Its knowledge of the violence the refugees flee and the inhumane difficulty they usually encounter regarding the standard of proof in asylum cases has induced it to join this brief.

LA RAZA LEGAL ALLIANCE is an organization of lawyers, legal workers and law students intended to defend the cultural and legal rights of Latinos within the United States. Its involvement in the litigation on behalf of undocumented alien school children reflects its historical interest in the rights of the undocumented.

LUTHERAN IMMIGRATION AND REFUGEE SERVICE OF THE LUTHERAN COUNCIL IN THE UNITED STATES OF AMERICA is a non-profit agency of the Lutheran church that has for 35 years served refugees, immigrants and undocumented persons through counseling, resettlement, advocacy and education. A significant number of persons served through the efforts of Lutheran Immigration and Refugee Service have been, are being or will be significantly effected by standards set to determine eligibility for refugee or asylee status.

The MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (MALDEF) is a national civil rights organization dedicated to preserving the Constitutional and civil rights of

persons of Mexican and Hispanic descent, including those who are undocumented.

The NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC. in Los Angeles is a non-profit organization dedicated to the protection and promotion of the rights of immigrants and refugees in the United States. The Center has served as counsel in many significant federal cases concerning the rights of refugees, and provides direct assistance to indigent refugees in need of representation. Because the Center represents thousands of refugees who are seeking asylum in the United States, it has a direct interest in the standard used for evaluating asylum claims.

The NATIONAL MINISTRIES is one of the four principal national agencies of the AMERICAN BAPTIST CHURCHES IN THE U.S.A. which represents over 6000 congregations in this country. It has, since 1948, been involved in the resettlement of refugees and has sponsored 55,480 refugees as of May 31, 1983. The principles involved in *Immigration and Naturalization Service v. Stevic* are central to the National Ministries' mission of providing assistance to refugees and protection of their rights.

The SALVADORAN REFUGEE COALITION OF DENVER is composed of religious and lay persons who provide support and community assistance to Salvadoran refugees.

The TUCSON ECUMENICAL COUNCIL TASK FORCE FOR CENTRAL AMERICA provides legal aid and social services for thousands of Central American refugees who live in, or pass through, southern Arizona. It currently represents 1,600 asylum applicants, not one of whom has been granted political asylum.

The UNITARIAN UNIVERSALIST SERVICE COMMITTEE (UUSC) in Boston is a non-sectarian, non-profit organization founded in 1939 and dedicated to promoting economic, social, civil and political rights of people throughout the world. UUSC's relief programs assist refugees throughout Central America as well as support efforts to obtain extended voluntary departure status for Salvadorans and Guatemalans already in this country.

The WASHINGTON ASSOCIATION OF CHURCHES is a statewide ecumenical organization in Washington state. It has a long history of immigration and refugee concerns. The issues raised in *Immigration and Naturalization Service v. Stevic* are of special interest to it in terms of its newly organized program to respond to the social service needs of Salvadoran and Guatemalan refugees in Washington.

The WILLIAMETTE VALLEY IMMIGRATION PROJECT in Woodburn, Oregon, is a non-profit community-based organization active in legal defense for Spanish-speaking non-U.S. citizens with immigration problems. The organization and staff have been certified under 8 CFR §292 to conduct representation in immigration matters as non-attorneys since July 1, 1977. Its interest in the *Stevic* case stems from its involvement in legal defense of asylum applicants from Central America. Adoption by the Court of the well-founded fear standard of proof for persecution claims is vital to the future safety of its Central American clients.

APPENDIX B

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

WASHINGTON LIAISON OFFICE
1785 MASSACHUSETTS AVE., N.W.
WASHINGTON, D.C. 20036

[SEAL]

HAUT COMMISSARIAT
DES NATIONS UNIES
POUR LES REFUGIES

DELEGATION A WASHINGTON

TELEPHONE: (202) 387-8546

January, 1982

Dear

We have, in recent months, received numerous requests from or on the behalf of Salvadoran, Haitian and other asylum seekers for advisory opinions as to their eligibility for refugee status under the provisions of the United Nations Convention/Protocol on the Status of Refugees. Those which we have favorably reviewed, we have issued a "mandate certificate" to the effect that the individual concerned, on the basis of the information available, is considered to be a refugee under the mandate of the Office of the United Nations High Commissioner for Refugees.

This is to advise you that it has been decided recently that the practice of issuing mandate certificates by this office would cease *except in the following instances: (a) asylum claimants in detention and facing the imminent threat of refoulement; and (b) appeals against initial negative decisions.* The primary considerations for this change in practice as far as the U.S. is concerned were as follows:

- a. Since the U.S. is a party to the protocol and has established a formal procedure for the determination of asylum status, UNHCR feels that it is neither productive nor constructive to conduct what in effect would amount to a parallel asylum determination procedure by the United Nations. UNHCR will instead continue to seek a formal role of advisory character under the proposed new U.S. asylum eligibility procedure.
- b. UNHCR does not presently have the capacity or resources—human and material—to handle effectively the

numerous requests for advisory opinions as to possible eligibility. For instance, besides the Chief of the Office, there are only two other professional officers—the Legal Officer and the Information Officer, in the Washington Liaison Office.

- c. As UNHCR has no opportunity to interview directly most of the individual cases that have been referred to this office, we are hardly in a position to engage in a fact-establishing process and to make any assessment as to the credibility of the asylum applicant's statements. In this situation we feel that the best we can do is to offer some general but practical guidance, based on the office's accumulated experience in the international legal protection of refugees. That is why UNHCR has made available, at a reasonable cost, copies of its *Handbook on Procedures and Criteria for Determining Refugee Status*, (hereinafter referred to as the *Handbook*) to lawyers, groups and individuals concerned with refugee problems, although it was originally intended for the guidance of government officials. The Office remains, needless to say, ready and willing to offer guidance in those issues that are neither covered nor adequately dealt with in the *Handbook*.

May we take this opportunity also to elaborate further on the position of UNHCR on certain legal issues pertaining to the protection of refugees in general and to the situation of Salvadoran asylum seekers in particular.

A. "Prima Facie" Refugee/Asylum Status

"Prima Facie" determination of refugee status is usually not resorted to under the 1951 Convention and the 1967 Protocol since most States that have adhered to either instrument have established procedures to decide on individual applications. The "prima facie" construction has, however, sometimes been used by UNHCR when determining mandate status on an *ad hoc* basis in cases of sudden, large scale

influx, or where it was otherwise impractical to determine the status of asylum-seekers individually. (See paragraph 44 of the *UNHCR Handbook*). Broadly speaking, such a determination is theoretically based on (1) the existence of an *objective situation* in the country of origin, i.e. the element of persecution, and (2) a presumption that the *subjective element*, i.e., fear of persecution, is also present; with the result that the persons concerned are deemed to be refugees under the mandate of UNHCR as defined in its Statute. They are therefore considered as entitled, both as a group and as individuals, to UNHCR protection.

B. *Role of UNHCR in refugee/asylum determination process*

UNHCR was established by the U.N. General Assembly in resolution 319 (IV)3 of 1949. This was followed a year later by another G.A. resolution, Resolution 428 (V), which expressly called upon governments to cooperate with the Office of UNHCR in the performance of functions which are set out in the Statute, annexed to that resolution. The primary function of the Office, as defined under its Statute, is to extend international protection to refugees who by definition are, at least temporarily, unable or unwilling to enjoy the diplomatic protection of their former homeland. In this role the UNHCR, which acts as the refugees' "ambassador" in the countries of asylum, seeks among other things to ensure first and foremost that no one, for whatever reason, including *illegal* entry, is forcibly returned to a country where he/she may have reason to fear persecution, (that is, all nations must scrupulously uphold the cardinal principle of *non-refoulement*), and secondly, that persons claiming to be refugees are expeditiously identified as such and are granted a favorable legal status in their country of asylum. The legal rights of refugees/asylees, above and beyond those they are entitled to as individual human beings, have been identified and defined under the 1951 Convention and the 1967 Protocol relating to the status of refugees. These instru-

ments define not only the rights but also the duties of refugees, and contain provisions relating to a variety of issues: for example, the right to family unification, employment authorization, education and welfare assistance.

We should emphasize that the protection role of UNHCR is not conditional upon prior government consent. The UNHCR will intervene to protect refugees' legal rights if it receives complaints that they are being violated and, with respect to States party to international instruments, the UNHCR has a responsibility to supervise their actual application. The legal basis of UNHCR's protection role can specifically be found in para. 8(a) of the Statute read together with para. 6 of the Preamble and Art. 35 of the 1951 Convention, as well as Article II of the 1967 Protocol. Those provisions, on the one hand, entrust the High Commissioner with the responsibility of supervising the implementation of the provisions of the international refugee instruments in the territory of each contracting State, and, on the other hand, oblige States party to either of those instruments to cooperate with the Office in the exercise of its supervisory role. Article 35 of the Convention, for example provides:

"(1) The Contracting States undertake to cooperate with the Office of UNHCR—in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

UNHCR, of course, recognizes that there is no one model asylum procedure that should be adopted universally, and it is therefore the sovereign right of each State party to establish the procedure that it considers most appropriate in the light of its own particular constitutional, judicial and administrative structure.

It has been internationally recognized, however, that every such determination procedure ideally should meet certain

basic and minimal requirements in order to ensure fairness and effectiveness. Specifically, at the General Assembly's 28th session in 1977, in a major meeting on international protection at which the U.S. was represented, it was recommended that procedures for determining refugee status fulfill at least seven basic requirements. These recommendations stress: early identification of claimants at frontiers (such as airports); provision of guidance to the claimant as to the procedure to be followed, as well as necessary facilities to make his claim, including competent interpretation and access to counsel. It was also recommended that a clearly identified authority be responsible for examining requests for refugee status and for making decision in the first instance. Further, there should be the possibility to appeal for formal reconsideration of negative decisions, and the right to remain in a country pending appeal outcomes. It was recommended additionally that States party give favorable consideration to UNHCR formal participation in the process. Such recommendations of course have no binding force in international law, but can be used persuasively vis-a-vis governments which are members of the Executive Committee and have voted for such a recommendation.

C. *Definitions of Persons of Concern to UNHCR*

Persons fulfilling the definition of the term "refugee" under Chapter II of the Statute of the UNHCR, fall within our competence. This covers, for example:

"Any person who—owing to well-founded fear of being persecuted *for reasons of race, religion, nationality or political opinion*, is outside the country of his nationality and is unable or, owing to such fear or for reasons *other than personal convenience*, is unwilling to avail himself of the protection of that country . . ." [emphasis ours].

The refugee definition in the Statute is thus essentially the same as which figures in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, although it makes no reference to the criterion of "membership of a particular social group." Needless to say, persons who are recognized "Convention/Protocol refugees" also fall under the mandate of the Office. So do *bona-fide* asylum seekers who have not yet gained formal recognition as refugees by the country of refuge. (See p. 6 below.)

The scope of UNHCR's mandate has since been gradually extended by various UN General Assembly resolutions so that UNHCR may also provide international protection to externally displaced persons if these find themselves in a *refugee-like* situation due to events (sometimes referred to as "man-made disasters") arising in their country of origin. The Office's concern for externally displaced persons has found strong legal affirmation in Africa where the Refugee Convention of the Organization of African Unity contains a widened definition of the term "refugee" which embodies the notion of externally displaced persons:

"The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin, nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality" (Art. 1, para. 2.)

In summary, persons within the mandate of UNHCR include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds, but also those of the large group of categories of persons who can be determined or presumed to be without, or unwilling to avail themselves of, the protec-

tion of their country of origin because of certain objective factors occurring there. Such persons, in particular, should under no circumstances be obliged, directly or indirectly, to return to their home country as long as the civil strife continues and as long as their fear of such violence remains well-founded.

It is important to emphasize that the extension of the scope of the protection mandate of UNHCR has not emanated from UNHCR itself but from the member states of the United Nations (including the U.S.) which adopted the said resolutions.

D. *Comments on Certain Aspects of the Definition of the term "Refugee"*

The *Handbook* deals with most of the issues mentioned below. Our present comments are simply in elaboration of what is contained therein.

- a. *Burden of Proof*—The granting of asylum is a legal as well as a humanitarian act and since decisions on asylum may well decide the life or death of a person, UNHCR strongly holds that a high standard of fairness is essential in any asylum determination process. Thus, while in principle, the burden of establishing a valid claim rests with the individual claimant, unless there is reason to the contrary to doubt the credibility of a claimant, the benefit of the doubt should always be given to him even in the absence of other corroborative evidence. In UNHCR's view, therefore, the "balance of probabilities" standard is rather strict since any doubt should be resolved in favor of the claimant.
- b. *Application of the "Refugee" Definition*—UNHCR advocates a liberal interpretation and application of the refugee definition in consonance with the fundamental humanitarian character of the institution of asylum. A narrow and rigidly legalistic application of

the definition would inevitably leave a large number of *bonafide* asylum seekers without refuge and would subvert the spirit of the Convention and/or Protocol. Immigration considerations, in particular, must not be brought to bear on the application of the refugee definition. The possibility for instance that, if one person were given asylum status, many others might also be entitled to claim asylum status is not a relevant consideration as to whether the asylum claim is a valid one. Moreover, any assumption of an abuse of procedures in order to gain entry into a country should not be allowed to weigh negatively in a judgment on the merits of specific asylum applications; such a posture would lead inevitably to a subversion of the spirit of national commitments to the Convention and Protocol.

- c. *Fear of Persecution*—Refugees are generated by conditions, political in the broadest sense, which render continued residence intolerable or impossible. Concerned as it must be with events which have not yet occurred, the refugee definition relates to with possibilities and probabilities rather than certainties. While past persecution is evidence to substantiate a well-founded fear, it need not be the only evidence. What has happened to others in similar circumstances, for instance, may be sufficient evidence of a well-founded fear of persecution. Where measures of persecution are found to be directed against a group of persons which have common characteristics, such measures must as a rule be considered to be directed against every member of the persecuted group. And a person who has not been persecuted simply because he has not yet attracted the attention of his government, need not wait until detection and persecution before he can claim refugee status. Nor need he be under the threat of imminent

persecution. Moreover, a person need not be singled out for persecution in order to be a refugee; each claim however, must be assessed individually and once that takes place, it ought not to be rejected simply because a large number of others could also legitimately fear the same persecution.

- d. *Forms of Persecution*—The categories of persecution are not finite and, depending on circumstances may comprise of such overt measures as threats to life and liberty, e.g., execution, detention, torture, etc., but may consist of less overt measures such as the imposition of severe economic disadvantage or the denial of access to employment or to education. In UNHCR's view, persecution may also take the form of indiscriminate terror. Persons may be persecuted and harassed for no apparent cause at all, other than for the purpose of instilling fear and terrorising them into political submission. Persons with a well-founded fear of becoming victims of government-supported terrorist tactics are refugees under the terms of both the Statute and the U.N. Convention/Protocol on the Status of Refugees. These may include those who may have been totally inactive politically and have not articulated any political opinions of their own. For the phrase "well-founded fear of persecution by reason of political opinion" does not mean only the political opinion of the asylum claimant, it also means what is imputed to be the political opinion of the particular claimant, or those in the particular social group to which he belongs, by the authorities of the country from which the claimant has fled. Persecution may also be periodic. It need not be continuous. As long as the pattern of periodic arrests and of harassment can be expected to continue, persecution will be established.

* * * * *

B-10

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

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[SEAL]

HAUT COMMISSARIAT
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POUR LES REFUGIES

DELEGATION A WASHINGTON

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Mr. K. Steinberg
Simmons and Ungar
517 Washington Street, Suite 301
San Francisco, California 94111

April 15, 1982

Dear Mr. Steinberg;

With reference to the letter we sent you early this year concerning, among other things, the UNHCR mandate and the definition of refugee as well as the situation of Salvadoran asylum seekers, two corrections should be noted:

- i. at page four paragraph D. a. "Burden of Proof"—the last sentence should read:

"In UNHCR's view, therefore, *the clear probability standard* is rather strict since any doubt should always be resolved in favor of the claimant."

- ii. at page seven, paragraph F. "Conclusions of the Executive Committee on the Protection of Asylum Seekers in Situations of Large-Scale Influx", the first sentence should read as follows:

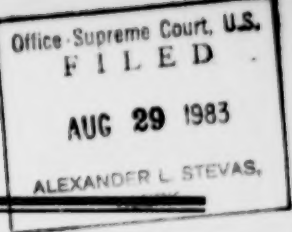
"At its 32nd Session (20 October 1981) the Executive Committee, of which the United States is a member, unanimously adopted the following recommendations with regard to protection of asylum seekers in situations of large-scale influx: . . ."

We apologize for any inconvenience that may have been caused by these errors.

Sincerely,

United Nations High Commissioner
for Refugees
Washington Liaison Office

No. 82-973



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, *Petitioner*

v.

PREDRAG STEVIC, *Respondent*

On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit

**BRIEF OF THE OFFICE OF THE UNITED
NATIONS HIGH COMMISSIONER FOR
REFUGEES AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-973

IMMIGRATION AND NATURALIZATION SERVICE, *Petitioner*

v.

PREDRAG STEVIC, *Respondent*

On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit

**BRIEF OF THE OFFICE OF THE UNITED
NATIONS HIGH COMMISSIONER FOR
REFUGEES AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT**

INTEREST OF THE AMICUS

This brief is submitted by the Office of the United Nations High Commissioner for Refugees, as *amicus curiae* in this case, with the consent of the parties.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with the responsibility of providing international protection, under the auspices of the United Nations, to refugees within its mandate and of seeking permanent solutions to the problems of refugees.¹ The Statute of the Office of

¹ U.N. General Assembly Resolution 428(V) 1950; Annex: *Statute of the Office of the United Nations High Commissioner for Refugees*.

the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of his Office by, *inter alia*:

Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto . . .²

This supervisory responsibility of the UNHCR is formally recognized in Article II, paragraph 1, of the United Nations Protocol of 1967 relating to the Status of Refugees (1967 Protocol), to which the United States became a party in 1968:

The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

The present case, concerning as it does the interpretation of statutory provisions deriving from the provisions of the 1951 United Nations Convention relating to the Status of Refugees (1951 Convention), through the 1967 Protocol, presents questions involving essential interests of refugees within the mandate of the High Commissioner. The resolution of this case is likely to affect the interpretation by the United States of its responsibilities under the 1967 Protocol with regard to the determination of refugee status and the application of the principle of *non-refoulement*. The outcome of this case can moreover be expected to influence the manner in which the authorities of other countries apply the refugee definition contained in the 1951 Convention and incorporated by reference in the 1967 Protocol.

For these reasons, the UNHCR respectfully submits this brief in support of the interpretation of the relevant provisions of the 1967 Protocol which was adopted by the Court of Appeals for the Second Circuit in the decision below.

² *Id.* ¶ 8.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, the UNHCR seeks to demonstrate, first, that the legislative histories of the United States' accession to the 1967 Protocol, 19 U.S.T. 6223, 606 U.N.T.S. 268, and of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, *et seq.*, show that the refugee definition in the 1951 Convention, 189 U.N.T.S. 150, and in the 1967 Protocol has been incorporated without qualification into United States law.

Second, it will be shown that the refugee definition in Article 1 of the 1951 Convention must be interpreted to mean that a person should be recognized as a refugee if he has "good reason" to fear persecution for the stated reasons; that is, if his subjective fear of being persecuted is based upon an objective situation which makes that fear plausible and reasonable under the circumstances. A person may have good reason to fear persecution even though it cannot be established that it is more likely than not that he would in fact be singled out for persecution.

Third, the term "clear probability of persecution" can be taken to mean that an applicant must prove that he would more likely than not be subjected to persecution if returned to his country of origin. The court below was therefore correct in holding that the "clear probability" standard is inconsistent with the requirements of the 1967 Protocol as incorporated into United States law by the Refugee Act of 1980.

I. The legislative history of the United States' accession to the 1967 Protocol shows that the Senate was advised that the United States could comply with its obligations under the 1967 Protocol without amending the existing statutes of the United States. In particular, the Senate was informed that the prohibition in Article 33 of the 1951 Convention against returning a refugee to any territory where his life or freedom would be threatened could be implemented by the Attorney General within the administrative discretion permitted by existing regulations. Nothing in the legislative history of the United States' accession indicates that the Senate made its advice and

consent to accession conditional on the continuation of a previously applied evidentiary standard in the interpretation of the refugee definition. Moreover, the legislative history of the Refugee Act of 1980 clearly shows that Congress intended to conform domestic law with the United States' obligations under the 1967 Protocol and to ensure that United States statutes and regulations would be construed in a manner consistent with the relevant international norms.

II. The UNHCR's interpretation of the term "well-founded fear of being persecuted" is based on the legislative history of the 1951 Convention, the interpretation given to a similar term in the Constitution of the International Refugee Organization (IRO), from which the 1951 Convention definition derives, the consistent practice of the UNHCR in applying the Convention definition both before and after the adoption of the 1967 Protocol, and the plain meaning of the words themselves.

In light of the understanding of the term "refugee" by the drafters of the 1951 Convention and the stated objectives of the international community in adopting this Convention, the UNHCR submits that "well-founded fear of being persecuted" means that, in order for a person to qualify for refugee status, it must be shown that his subjective fear of persecution is based upon objective facts which make that fear plausible and reasonable under the circumstances. In applying this evidentiary standard, due account must be taken of the precarious situation in which applicants for refugee status normally find themselves.

III. To require an applicant for refugee status to establish that he would more likely than not be exposed to persecution would be in contradiction to the recognized need to acknowledge the special difficulties with which such an applicant may be confronted in establishing his case. There may indeed be many situations in which a person could qualify for refugee status even though he would not be in a position to prove in objective terms that persecution may *in fact* take place. Since the "clear probability" standard can be taken to mean that

persecution must be more likely than not, this standard is inconsistent with the refugee definition in the 1951 Convention and the 1967 Protocol, as well as with the Refugee Act of 1980.

The decision of the Court below should, therefore, be affirmed.

ARGUMENT

I. THE LEGISLATIVE HISTORIES OF BOTH THE UNITED STATES' ACCESSION TO THE 1967 PROTOCOL AND OF THE REFUGEE ACT OF 1980 SHOW THAT THE REFUGEE DEFINITION IN THE 1951 CONVENTION AND THE 1967 PROTOCOL HAS BEEN INCORPORATED WITHOUT QUALIFICATION INTO UNITED STATES LAW.

A. Nothing In The Legislative History Of The United States' Accession To The 1967 Protocol Implies That The Senate Intended To Endorse Any Prior Standard Of Proof Which Might Be Inconsistent With The Protocol.

Since 1968, the United States has been a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Convention. Both instruments provide for the fair and humane treatment by States Parties of any person who, owing to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion, is unable or unwilling to return to his country of nationality or his former habitual residence.

The Petitioner asserts that the United States acceded to the 1967 Protocol on the assumption that "such action would not alter or enlarge the substance of our immigration laws." Brief for the Petitioner herein, Immigration and Naturalization Service (hereinafter cited as INS Brief) at 9. Read in context, however, the legislative history shows that the Senate focused its attention first on the admission of refugees and second on areas where possible amendments to United States legislation might be necessary.

As far as the admission of refugees is concerned, the Petitioner, *id.* at 26, refers to remarks in Mr. Lawrence A. Daw-

son's prepared statement, that accession to the 1967 Protocol "does not in any sense commit the Contracting State to enlarge its immigration measures for refugees."³ This view was reiterated by Mr. Dawson during the hearing before the Senate Foreign Relations Committee when he stated "that there is nothing in this Protocol which implies or puts any pressure on any Contracting State to accept additional refugees as immigrants."⁴

It is clear from the context that these statements relate exclusively to refugee admissions, a matter not addressed in the 1951 Convention and the 1967 Protocol, and they have no bearing on the application of the refugee definition in asylum or deportation proceedings.

When discussing possible conflicts between the 1967 Protocol and the laws of the United States, three areas were mentioned: (i) the United States tax laws; (ii) the United States social security laws; and (iii) the deportation provisions of the Immigration and Nationality Act. The first two of these possible conflicts were resolved by the United States' acceding to the 1967 Protocol with reservations in respect of Articles 24 and 29(1) of the 1951 Convention.⁵

The discussion of the 1967 Protocol's implications for the deportation provision of the Immigration and Nationality Act is the aspect of the Senate hearings which bears the most direct relevance to the issue under consideration in the present case. In referring to the obligations under Articles 32 and 33 of the 1951 Convention, Mr. Dawson pointed out that:

... the asylum concept is set forth in the prohibition under Article 33 of the Convention against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition

³ S. Exec. Doc. K, 90th Cong., 2nd Sess. (1968), at 6.

⁴ S. Exec. Rep. No. 14, 90th Cong., 2nd Sess. (1968), at 10.

⁵ *Id.* at 6.

under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act *with limited exceptions*, are consistent with this concept. *The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment to the Act.*⁶

The report of the Secretary of State was to the same effect:

(F)oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened. This Article is comparable to Section 243(h) of the Immigration and Nationality Act, . . . and *it can be implemented within the administrative discretion provided by existing regulations.*⁷

As Mr. Dawson stressed during the hearings, the Attorney General could implement the changes required by accession to the 1967 Protocol "without the enactment of any further *legislation*"⁸ and "without amendment to the Act."⁹

The legislative history of the United States' accession to the 1967 Protocol thus shows that the Senate did not touch upon the question of the interpretation and application of the refugee definition but focused on areas where accession to the 1967

⁶ *Id.* (emphasis supplied). With respect to deportation, Mr. Dawson and his colleague, Eleanor McDowell, furthermore noted that two grounds of deportation—pertaining to the mentally ill and to public charges—"perhaps could not be . . . construed" in a manner consistent with the 1967 Protocol. S. Exec. Rep. No. 14, 90th Cong., 2nd Sess. (1968), at 8. It was stated that "(t)hese two areas would not be enforced against refugees if the protocol were in force." *Id.*

⁷ S. Exec. Doc. K, 90th Cong., 2nd Sess. (1968) III at VIII (emphasis supplied).

⁸ S. Exec. Rep. No. 14, 90th Cong., 2nd Sess. (1968) at 8 (emphasis supplied).

⁹ *Id.* at 6.

Protocol might possibly require changes in the laws of the United States. In particular, the Senate did not address the question of what standard of proof should be applied in asylum cases. Where changes in the laws of the United States were not considered necessary, it was assumed that United States legislation and practice *could be applied in such a manner as to effectuate the provisions of the 1967 Protocol*. The legislative history contains no indication that the Senate intended to endorse the "clear probability" standard hitherto applied by the lower courts and the Board of Immigration Appeals (BIA) in asylum cases. It suggests, on the contrary, that this practice would need to be modified in so far as it could be inconsistent with the 1967 Protocol.

B. In Passing The Refugee Act Of 1980, Congress Intended To Bring United States Law Into Full Conformity With The 1967 Protocol By Incorporating The Refugee Definition Into Domestic Law Without Any Qualification.

It clearly appears from the Petitioner's brief that Congress in adopting the Refugee Act of 1980¹⁰ intended to conform United States' domestic law with its international obligations under the 1967 Protocol. INS Brief at 36-40.

To accomplish this purpose, Congress first replaced the existing refugee definition which, it was stated, would "finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the 1951 United Nations Refugee Convention and Protocol . . ."¹¹ Similar statements appear throughout the legislative history of the Act.¹²

¹⁰ Pub. L. No. 96-212, 94 Stat. 102 *et seq.*

¹¹ H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 9; S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 19.

¹² See, e.g., *Joint Explanatory Statement of the Committee of Conference*, H.R. Rep. No. 96-781, 96th Cong., 2nd Sess. (1980) at 19; S. Rep. No. 96-256, 96th Cong., 1st Sess. (1979) at 4. See also 126

Second, Congress amended Section 243(h) of the Immigration and Nationality Act (INA), which authorized the Attorney General to withhold the deportation of any alien in the United States to any country where, in his opinion, the alien would be subject to persecution on account of race, religion or political opinion. Persecution on account of nationality and membership in a particular social group were added by Congress "for the sake of clarity to conform the language of that section to the Convention."¹³ This change was felt to be necessary so that United States statutory law would clearly reflect its legal obligations under international agreements.¹⁴ In addition, Section 243(h) of the INA was transformed from a discretionary form of relief to a mandatory prohibition of *refoulement*, as required by Article 33 of the 1951 Convention.¹⁵ The amended provision was adopted "with the understanding that it is based directly upon the language of the 1967 Protocol and it is in-

Cong. Rec. H1521 (daily ed. March 4, 1980), remarks of Rep. Holtman: "... House definition of the term 'refugee' . . . essentially conforms to that used under the United Nations Convention and Protocol relating to the status of refugees." *Accord* 125 Cong. Rec. H11967 (daily ed. December 13, 1979); *Id.* at H11969 (remarks of Rep. Rodino); *Id.* at H11973 (remarks of Rep. Chisholm); *Id.* at H11979 (remarks of Rep. Esblocki), 126 Cong. Rec. S1753-S1754 (daily ed., February 26, 1980) (statement of Sen. Kennedy). Administration witnesses were equally emphatic. See *The Refugee Act of 1979, Hearings on H.R. 2816, Before the Subcommittee on International Operations of the House Committee on Foreign Affairs*, 96th Cong., 1st Sess. (1979) at 71 (remarks of Ms. Doris Meissner, Deputy Associate Attorney General: "What we have done in the Administration bill is simply incorporated the United Nations' definition for 'refugee' . . .").

¹³ H.R. Rep. No. 96-608, 96th Cong., 1st Sess. (1979) at 18.

¹⁴ *Id.* Congress also removed or modified the ideological, geographic, and numerical limitations on the conditional entry provisions of former § 203(a)(7) of the INA, 8 U.S.C. § 1153(a)(7).

¹⁵ *Stevic v. INS*, 678 F.2d 481, 409 (2d Cir. 1982). This statutory change altered the standard of judicial review of BIA decisions under 243(h). *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

tended that the provision would be construed consistent with the Protocol."¹⁶

Third, Congress intended to ensure a fair and workable asylum policy which was consistent with the United States' tradition of welcoming the oppressed of other nations and with its obligations under international law. Therefore, it was felt both necessary and desirable that an asylum provision should be included in the legislation.¹⁷

The discussions concerning the new refugee definition and Section 243(h) evidently have no bearing on the standard of proof, to which no reference was made. They simply reflect the intent of Congress to bring United States statutory law into conformity with the 1967 Protocol and, in particular, to incorporate its refugee definition without any qualification into the domestic law of the United States.

The asylum provision was introduced with the same purpose, and its legislative history similarly provides no support for the Petitioner's position "that passage of the Refugee Act was intended to work no change in the standard by which an alien must prove eligibility for asylum relief." INS Brief at 38. The Petitioner relies on the following statement in the Senate Report:

As amended by the Committee, the bill establishes an asylum provision in the Immigration and Nationality Act for the first time by improving and clarifying the proce-

¹⁶ S. Rep. No. 96-590, 96th Cong., 2nd Sess. (1980) at 20.

¹⁷ H.R. Rep. No. 96-608, *supra*, at 17-18. Congress therefore provided, under new Section 207, for the admission into the United States of refugees as defined in the 1967 Protocol from foreign countries, 8 U.S.C. (Supp. V) § 1157, and, under new Section 208 for the extension of asylum to any alien in the United States, regardless of his legal status, 8 U.S.C. (Supp. V) § 1158. As noted by the Petitioner, Congress intended to extend refugee status and asylum under the new law "only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees . . ." S. Rep. No. 96-256, 96th Cong., 1st Sess. (1979) at 9, quoted in INS Brief at 38-39.

dures for determining asylum claims filed by aliens who are physically present in the United States. *The substantive standard is not changed, asylum will continue to be granted only to those who qualify under the terms of the United States Protocol Relating to the Status of Refugees, to which the United States acceded in November 1969 [sic].*¹⁸

The Petitioner also relies on the remarks of Mr. David Martin, Office of the Legal Advisor, Department of State, that "(f)or purposes of asylum, the provisions in this bill do not really change the standards." INS Brief at 39.

In pointing out that the asylum provision would not change the "substantive standard," however, the Senate Report merely emphasizes that asylum would be granted as before only to persons fulfilling certain criteria in the United Nations refugee definition. The report does not, as suggested by the Petitioner, allude to the standard of proof hitherto applied in withholding of deportation cases by the Board of Immigration Appeals, of which Congress may not even have been aware. Indeed, as Mr. David Martin later testified in connection with the burden of proof question in asylum proceedings:

The Refugee Act . . . never became the occasion for a thorough-going reconsideration of the problems in the asylum adjudication process, largely because these problems really did not become fully apparent until after the Act was in place.¹⁹

In the legislative history of the Refugee Act of 1980, there is thus no indication that Congress intended the new refugee definition to be applied in the manner in which the Board of Immigration Appeals had previously applied the withholding of deportation provision of the Immigration and Nationality Act. On the contrary, both the House and Senate reports unequivocally reflect Congress' intention that the new refugee

¹⁸ S. Rep. No. 96-256, 96th Cong., 1st Sess. (1979), quoted in INS Brief at 38-39 (emphasis supplied).

¹⁹ *Asylum Adjudication: Hearings Before the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. (1981) at 132.

definition conform with the definition in the 1967 Protocol and should "be construed consistent with the Protocol".²⁰ The Refugee Act of 1980 can thus be taken to have incorporated the United Nations' definition of refugee into the domestic law of the United States without any qualification as regards its application.

As shown in Part II below, the 1967 Protocol does not require the asylum-seeker to prove a "clear probability of persecution" but establishes a different, less stringent standard: it must be shown that objective facts make the applicant's fear of being persecuted reasonable under the circumstances, with due regard being given to the difficulty of proof inherent in the asylum-seeker's particularly precarious and vulnerable situation.

II. THE TERM "WELL-FOUNDED FEAR OF BEING PERSECUTED" IN THE 1951 CONVENTION MEANS THAT IN ORDER FOR A PERSON TO QUALIFY FOR REFUGEE STATUS IT MUST BE SHOWN THAT HIS SUBJECTIVE FEAR OF PERSECUTION IS BASED UPON OBJECTIVE FACTS WHICH MAKE THE FEAR REASONABLE UNDER THE CIRCUMSTANCES, BUT NOT NECESSARILY THAT HE WOULD BE MORE LIKELY THAN NOT TO BECOME THE VICTIM OF PERSECUTION.

A. The Deliberations of The Ad-Hoc Committee On Statelessness And Related Problems, Which Developed The Basic Refugee Definition In The 1951 Convention, Demonstrate General Agreement Among The Participating Countries That The Individual's "Fear of Being Persecuted" For Specified Reasons Was The Central Element In That Definition And That Fear Has To Be Considered Well-Founded When A Person Could Show "Good Reason" Why He Feared Persecution.

The term "well-founded fear of being persecuted for reasons of race, religion, nationality . . . or political opinion" originated

²⁰ See footnotes 11 and 16.

with the Ad-Hoc Committee on Statelessness and Related Problems, and appears for the first time in the Draft Convention relating to the Status of Refugees adopted by the Ad-Hoc Committee at its first session in January and February 1950.²¹

This Committee, consisting of the representatives of thirteen governments,²² had been appointed in August 1949 by the United Nations Economic and Social Council (ECOSOC) to consider whether it was desirable to prepare a "revised and consolidated convention relating to the international status of refugees" and stateless persons, and if so to draft such a convention.²³ The subject was a matter of immediate concern because the decision had been made to terminate the activities of the International Refugee Organization (IRO), which was then the agency principally responsible for dealing with refugee problems on the international plane.²⁴

When it was convened on January 16, 1950 at Lake Success, New York, the Ad-Hoc Committee had before it a memorandum from the U.N. Secretary-General submitting a preliminary draft convention. This draft did not contain a definition of "refugee" but rather, in Article I, a description of three options for the formulation of such a definition.

At the beginning of the session, draft proposals for Article 1 of the Convention—the refugee definition—were submitted by

²¹ Report of the Ad-Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618 and Corr. 1 of 17 February 1950 (hereinafter cited as "*Report*").

²² Belgium, Brazil, Canada, China, Denmark, France, Israel, Poland, Turkey, Union of Soviet Socialist Republics, United Kingdom, United States, Venezuela. Poland and the USSR did not participate after the first meeting. See *Report*, paras. 4 and 10. The International Labor Organization and the International Refugee Organization were present as observers.

²³ ECOSOC Res. No. 248 B (IX) of 8 August 1949.

²⁴ Cf. U.N. G.A. Res. No. 62(I) of 15 December 1946 and ECOSOC Res. 248 A (IX) of 6 August 1949.

the United Kingdom, France and the United States.²⁵ While the drafts contained differences concerning the categories of persons to be covered by the convention,²⁶ they all included persecution or the fear of persecution as the basic element of the refugee definition.

The United Kingdom's proposal, which was originally drafted in terms wide enough to include both refugees and stateless persons, referred to "good reasons" for being unwilling to return to one's country of origin "such as, for example, serious apprehension based on reasonable grounds of . . . persecution."²⁷

The original French draft proposal for Article 1 provided that, subject to certain qualifications, the parties to the convention would recognize the refugee status of any person ". . . who has left his country of origin and refuses to return thereto owing to a justifiable fear of persecution. . . ."²⁸

The United States proposal applied the term "refugee" to persons defined as such in the various pre-war arrangements and conventions and also to "any person who is and remains outside his country of nationality or former habitual residence because of persecution or fear of persecution on account of race, nationality, religion or political belief," provided such person also belonged to one of certain specified categories.²⁹ The representative of the United States explained that the point of departure for the U.S. draft proposal had been, subject to certain modifications, the definition in the Constitution of the International Refugee Organization.³⁰

²⁵ U.N. Docs. E/AC.32/L.2, E/AC.32/L.3, E/AC.32/L.4 and Add.1 (17 January 1950).

²⁶ Briefly, the United Kingdom and France preferred to rely upon a broad general definition, while the United States proposal, although including a general definition, listed specific categories of refugees to be covered by the Convention.

²⁷ U.N. Doc. E/AC.32/L.2 (17 January 1950).

²⁸ U.N. Doc. E/AC.32/L.3 (17 January 1950) at 1 and 2.

²⁹ U.N. Doc. E/AC.32/L.4 and Add.1.

³⁰ U.N. Doc. E/AC.32/SR.5, para. 9.

On January 19, 1950, the United Kingdom submitted a revised draft proposal for Article 1 in which the term "well-founded fear of persecution" appears for the first time:

In this Convention, the expression 'refugee' means, except where otherwise provided, a person who, having left the country of his ordinary residence on account of persecution or well founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is not allowed by the authorities of that country to return there and who is not a national of any other country.³¹

On the same day, the Ad-Hoc Committee appointed a working group composed of the representatives of four countries—France, Israel, the United Kingdom and the United States—to draft a refugee definition that would obtain general approval, using the United States proposal as the basic working document.³² On January 23, the working group presented a provisional draft which employed, for persons who became refugees as a result of events in Europe after September 3, 1939, and before January 1, 1951, the term "owing to persecution, or a well-founded fear of persecution, for reasons of race, religion, nationality or political opinion".³³ With certain stylistic modifications, but with no disagreement as to the substance, this was accepted as the central element of the definition applicable to post-war refugees in the Draft Convention which was adopted by the Ad-Hoc Committee and transmitted to the Economic and Social Council:

Article 1 - Definition of the term "refugee"

A. For the purpose of this Convention, the term "refugee" shall apply to:

1. Any person who:

(a) As a result of events in Europe after 3 September 1939 and before 1 January 1951 has well-

³¹ U.N. Doc. E/AC.32/L.2/Rev.1 (19 January 1950).

³² U.N. Doc. E/AC.32/SR.6 at 6-8. The representatives of the International Refugee Organization also participated in the deliberations of the working group.

³³ U.N. Doc. E/AC.32/L.6.

founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion, and

- (b) Has left or, owing to such fear, is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, and
- (c) Is unable or, owing to such fear, unwilling to avail himself of the protection of the country of his nationality.

This provision shall not include a person who was a member of a German minority in a country outside Germany and who is in Germany. . . .³⁴

Following the adoption of the Draft Convention by the Ad-Hoc Committee, the Secretary-General invited governments to comment on it. None of the comments received suggested any disagreement as to the use of the specific term "well-founded fear of persecution" in the refugee definition.³⁵

This refugee definition was the subject of extensive further discussions in the Economic and Social Council (ECOSOC), at its 11th Session (August 1950),³⁶ in the United Nations General Assembly (Fifth Session),³⁷ and in the Conference of Plenipotentiaries which met in Geneva in July 1951 to consider and adopt the 1951 Convention in its definitive form. However, these discussions, like those in the Ad-Hoc Committee, focused almost exclusively on such questions as date-lines, categories of persons to be included, criteria for exclusion, and the geographical limitation on the persons covered by the Convention. The basic refugee definition adopted by the Ad-Hoc Com-

³⁴ U.N. Doc. E/1618 and Corr. 1, Annex I (17 February 1950).

³⁵ See U.N. Doc. E/AC.32/L.40, Memorandum by the Secretary-General of 10 August 1950, and documents cited at n.52 *infra*.

³⁶ See ECOSOC Res. 319 B (XI) of 16 August 1950, and U.N. Doc. A/1396, *Draft Convention relating to the Status of Refugees: Note by the Secretary-General* (26 September 1950).

³⁷ See U.N. G.A. Res. 429(V) of 14 December 1950 and U.N. Doc. A/1682, *Report of the Third Committee* (12 December 1950).

mittee, and in particular the reference to a "well-founded fear of being persecuted" for specific reasons, was not questioned, and after undergoing additional stylistic changes emerged substantially unaltered, for present purposes, in the 1951 Convention.³⁸

In its report to ECOSOC, the Ad-Hoc Committee provided a rather extensive set of comments on the provisions of the Draft Convention.³⁹ With regard to the element of the refugee definition which is of concern in the present case, the Committee's comment was as follows:

The expression 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecution or can show *good reason* why he fears persecution. . . .⁴⁰ (emphasis supplied).

Since the formulation adopted by the Committee elicited general approval and was henceforth included without debate in virtually all subsequent draft definitions,⁴¹ the *travaux préparatoires* to the 1951 Convention contain no further discussion of its meaning. The comment of the Ad-Hoc Committee remains the final statement by the framers of the 1951 Convention interpreting the term "well-founded fear of being persecuted."

³⁸ The same basic definition figures in the Statute of the Office of the UNHCR, U.N. G.A. Res. 428 (V) of 14 December 1950, Annex, paras. 6(A)(ii) and 6(B).

³⁹ *Report*, U.N. Doc. E/1618, Annex II. The report of the Ad-Hoc Committee, including the Draft Convention and the explanatory comments, together with the comments of Governments, was transmitted by ECOSOC to the U.N. General Assembly. See ECOSOC Res. 319 B(IX), *supra*.

⁴⁰ *Report*, U.N. Doc. E/1618 at 39.

⁴¹ See, e.g., U.N. Doc. E/L.82 (ECOSOC) (France: amendment to the draft convention relating to the status of refugees) (29 July 1950) and U.N. G.A. Docs. A/C.3/L.114, A/C.3/L.115, A/C.3/L.125, A/C.3/L.130 and A/C.3-L.131 Rev.1 (2 November - 1 December 1950) - (Various countries proposed definitions of "refugee") (reprinted in 5 UNGAOR, Annex (Agenda Item 32) 16-20 (1950).

B. The Term "Well-Founded Fear Of Being Persecuted" In The 1951 Convention Must Be Read In Light Of The Interpretation Given To The Term "Fear, Based On Reasonable Grounds Of Persecution" In The Constitution Of The International Refugee Organization (IRO), From Which It Was Derived, As Requiring That An Applicant Be Able To Show Plausible Reason For Fearing Persecution.

The comments of the Ad-Hoc Committee on the Draft Convention also include the following "general observation":

In drafting this convention the Committee gave careful consideration to the provisions of previous international agreements. It sought to retain as many of them as possible in order to assure that the new consolidated convention should afford *at least as much protection* to refugees as had been provided by previous agreements. . . .⁴² (emphasis supplied).

It has already been noted⁴³ that one of these "previous international agreements", the Constitution of the International Refugee Organization, had served as the point of departure for the refugee definition in the U.S. draft proposal. Under the IRO Constitution, the determination of whether a refugee or displaced person was of concern to the Organization involved an evaluation of the validity of his objections to returning to his country of origin. The term "well-founded fear of persecution" in the first drafts of the 1951 Convention derives from one of the three "valid objections" listed in the IRO Constitution:

. . . . The following shall be considered as valid objections:
(1) Persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinion, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations. . . .⁴⁴

⁴² *Report*, U.N. Doc. E/1618 at 37.

⁴³ *Supra* page 14 and n.30.

⁴⁴ Constitution of the International Refugee Organization, United Nations Treaty Series No. 283, Vol. 18, at 3, Annex I, Part I, Section C(l)(a)(i).

The parallel between this language and that used in the U.S. draft proposal⁴⁵ would be obvious even without the U.S. delegate's statement that the IRO Constitution had been the "point of departure" for his proposal.⁴⁶ The link between this "valid objection" in the IRO Constitution and the definition of "refugee" in the draft proposals submitted to the Ad-Hoc Committee is also clear as regards the French and British proposals. The term used in the official French version of the IRO constitution as the equivalent of "fear, based on reasonable grounds of persecution" is "*crainte fondée de persécution*." This is precisely the phrase used in the draft proposal submitted by the representative of France to the Ad-Hoc Committee, and which was translated from the original French on that occasion as "justifiable fear of persecution". The original United Kingdom proposal to the Ad-Hoc Committee⁴⁷ had also used a term, "serious apprehension based on reasonable grounds. . . of persecution", very close to the IRO terminology. Finally, the term used in the revised United Kingdom proposal (and eventually adopted by the Committee), "well-founded fear", is so close to the French "*crainte fondée*" as to appear to be a retranslation. Thus it seems evident that the members of the Ad-Hoc Committee were willing to adopt, for the basic refugee definition in the Draft Convention, an expression which was in effect a rephrasing of the term used in the IRO Constitution.

The close connection between the terms "fear, based on reasonable grounds of persecution" in the IRO Constitution and "well-founded fear of being persecuted" in the 1951 Convention is significant for an understanding of the latter term inasmuch as the meaning of the earlier phrase had been clearly established through the eligibility decisions made by the IRO.

The *Manual for Eligibility Officers* published by the IRO includes the following comments on the meaning of the term

⁴⁵ U.N. Doc. E/AC.32/L.4, *supra*, at 5.

⁴⁶ U.N. Doc. E/AC.32/SR.5, at para. 9.

⁴⁷ U.N. Doc. E/AC.32/L.3 (17 January 1950).

"persecution or fear based on reasonable grounds of persecution":

As regards objections derived from 'persecution or fear, based on reasonable grounds, of persecution. . .', it is neither incumbent upon nor possible for the Organization to give its own independent and objective view about the conditions at present prevailing in some of the countries of origin of the Displaced Persons. Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to political convictions or to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling the Eligibility Officer cannot refuse to consider the objection as valid when it is plausible. . . .⁴⁸

Although the IRO Eligibility Manual was prepared for use by the organization's eligibility officers rather than by government officials, it was based on eligibility decisions of which concerned Governments were well aware.⁴⁹ The representatives of the United Kingdom on the Ad-Hoc Committee referred explicitly to the IRO eligibility practice as having built up "a body of interpretive (*sic*) decisions" and considered that "the U.S. draft proposal was intended to be interpreted in the light of these precedents."⁵⁰

⁴⁸ IRO *Manual for Eligibility Officers* at 24. The Manual was circulated to member Governments of IRO on a confidential basis in February 1950 (see n. 49, *infra*). Since it is not in general circulation, excerpts of the relevant paragraphs are attached to this brief as Appendix I.

⁴⁹ The IRO Review Board submitted reports of its activities to the IRO General Council, in which the member Governments sat. See e.g. IRO Document GC/103, Report of the Chairman of the Eligibility Review Board (21 September 1949), which refers to the "more liberal view" taken by the Board concerning applicants' failure to provide documentary proof, and the practice of according "the benefit of the doubt" to applicants. The IRO Eligibility Manual itself was circulated to Governments in February 1950 and was the subject of some discussion by government representatives at the IRO General Council Fifth Session in March 1950 (IRO General Council, Fifth Session, Summary Records (GC/SR/64, 69, Annex 70).

⁵⁰ U.N. Doc. E/AC.32/SR.6 at 3.

The U.S. delegate for his part referred to the established meaning of terminology in the IRO Constitution used in the U.S. proposal and stated that the definition of "neo-refugees" (i.e., those included in the general post-war definition) had "already appeared in the IRO Constitution where its meaning was quite clear. It would have to have an identical meaning in the Convention."⁵¹

The records of the deliberations of the Ad-Hoc Committee thus demonstrate that the drafters of the refugee definition in the 1951 Convention were fully aware of the close connection between that definition and the one used in the IRO Constitution.⁵² The 1951 Convention's definition of "refugee," of course, stands on its own, and the commentary of the Ad-Hoc Committee does not mention the "valid objections" in the IRO Constitution. Nevertheless, the obvious links between the two definitions and the explicit references during the Ad Hoc Committee's discussions to the interpretative precedents created under the IRO show the context in which the 1951 Convention definition was written and in which it must be read.

⁵¹ U.N. Doc. E/AC.32/SR.5 at 2-5. The U.S. delegate to the Fifth Session of the IRO General Council in March 1950, who also represented the United States in the Conference of Plenipotentiaries which completed the 1951 Convention, made a similar statement defending the use of the IRO terminology in the Draft Convention:

But there is no question about what was meant. It was clearly understood that those who had fled as a result of persecution or fear therefore, or entertaining fears thereof, in their countries of origin, had valid reasons for rejecting repatriation.

IRO General Council, Fifth Session, Summary Record GC/SR.70, Annex at 9.

⁵² The representatives of France and Italy even expressed the views that the Draft Convention definition was too similar to the provisions of the IRO Constitution and in following the IRO definition too closely it was unduly restrictive. Consequently, both countries pleaded for a broader definition (see U.N. Doc. E/1703/Corr. 1, E/1703/Add. 2-7, and U.N. Doc. E/AC.32/L. 40 (Memorandum by the Secretary-General) of 10 August 1950).

Given the conceptual framework in which they were working, if the drafters of the 1951 Convention had intended to introduce a stricter test of refugee status under the new instrument, there would necessarily have been some mention of such an intention in the *travaux préparatoires*. These however contain no suggestion that the standard of eligibility under the 1951 Convention definition was to be narrower than that which prevailed under the IRO.⁵⁴ On the contrary, the expressed intention of the Ad-Hoc Committee "to provide at least as much protection to refugees" as previous international instruments,⁵⁴ shows that the definition in the 1951 Convention is to be interpreted in a manner similar to that adopted for the IRO Constitution, *i.e.*, as requiring the applicant to give a plausible and coherent account of why he fears persecution.⁵⁵

C. In Evaluating A Claim To Refugee Status Due Account Should Be Taken Of The Difficulty Of Proof Inherent In The Special Situation In Which An Applicant For Refugee Status Normally Finds Himself.

In the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, September 1979) atten-

⁵⁴ Indeed, the Ad-Hoc Committee's gloss of "well-founded fear of being the victim of persecution" as meaning that a person "can show good reason to fear persecution" serves to emphasize the similarity between the two standards by (a) repeating the subjective element ("fear") and (b) using a term—"good reason"—which is not obviously distinguishable from "reasonable grounds".

⁵⁴ *Report*, U.N. Doc. E/1618, *supra*, at 37. See page 18 *supra*.

⁵⁵ For a description of the application of the IRO definition during this period, see L.W. Holborn, *The International Refugee Organization, Its History and Work—1946 to 1952* (London 1956) at 210:

A more liberal interpretation of "valid objections" and the granting of the benefit of the doubt was practiced with a degree of understanding acquired by experience . . . Although the Constitution was not altered, it became apparent, from statements made during the sessions of the General Council, that member governments were developing a wider concept of *bona fide* refugee than that which had prevailed in the beginning. The Board therefore endeavoured to apply leniency to the widest extent possible.

tion is drawn to the fact that an applicant for refugee status is normally in a particularly vulnerable situation which may expose him to serious difficulties in submitting his case to the authorities (§ 190).

While it is a general legal principal that the burden of proof lies on the person submitting a claim, an applicant for refugee status may often not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence in support of all his statements will be the exception rather than the rule (§ 196). In view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself, the requirements of evidence should therefore not be too strictly applied (§ 197, see also §§ 203 and 204).

The need to facilitate the task of applicants for refugee status in presenting their cases is also recognized in the practice and in court decisions of States Parties to the 1951 Convention and/or the 1967 Protocol. Two examples which may be mentioned here relate to Canada and the Federal Republic of Germany.

In Canada, where decisions on refugee status are taken by the Minister of Employment and Immigration upon recommendation of a Refugee Status Advisory Committee, the Minister in 1982 announced new guidelines³⁶ aimed at assisting the members of the Advisory Committee to meet both the legal requirements of Canada's legislation and the "spirit" of its international commitment to refugees. These guidelines particularly underline the importance of giving applicants for refugee status the benefit of the doubt.³⁷ The Minister, in introducing the guidelines, pointed out:

Henceforth, the Committee is to be governed in its deliberations by two overriding presumptions: first, the appli-

³⁶ "New Refugee Status Advisory Committee Guidelines on Refugee Definition and Assessment of Credibility" of 20 February 1982.

³⁷ See paras. 3 and 15. See also para. 4 which states that the refugee definition looking, as it does, to the future "is concerned with possibilities and probabilities rather than with certainties."

cant is presumed to be telling the truth unless there is clear evidence to the contrary, and second, the benefit of the doubt must always be resolved in favour of the applicant. This pertains both to the application of the criteria as well as to the assessment of credibility.⁵⁸

In applying the refugee definition, the courts of the Federal Republic of Germany have also acknowledged the difficulty of proving a "well-founded fear of persecution," and have stated

that asylum-seekers as concerns proof often find themselves in a certain emergency situation typical of asylum cases ('sachtypischer Beweisnotstand'). This is particularly true for circumstances relevant to their asylum claim which take place outside the host country . . .⁵⁹

Moreover, it has been accepted as a general principle in the asylum practice of the Federal Republic of Germany that the applicant need not "prove" his statements. Instead, as a rule, it is sufficient that the facts on which his fear of being persecuted is based, appear to be credible ("Glaubhaftmachung genügt").^{60, 61}

⁵⁸ See Notes for an Address by the Honorable Lloyd Axworthy, Minister of Employment and Immigration, Canada, to the National Symposium on Refugee Determination, Toronto (20 February 1982) at 13.

⁵⁹ Federal Administrative Court, decisions of 29 November 1977—BVerwG I C 33.71—II.2.b; of 27 February 1962—BVerwG I C 183.59—II; of 27 September 1962, BVerwG I C 145.60 at 6.

⁶⁰ Federal Administrative Court, decision of 29 November 1977, *supra*; Administrative Court Ansbach, decision of 2 May 1973—No. 3877—II/73.

⁶¹ The principles set out above are furthermore applied in Belgium where the Minister of Foreign Affairs has delegated his authority to determine refugee status to the UNHCR. Also in Algeria, Australia, Canada, France, Italy, Morocco and a number of other countries, UNHCR participates in various forms in the procedures for determining refugee status (*see* Note on Procedures for the Determination of Refugee Status under International Instruments, U.N. Doc. A/AC.96/INF.153/Nov.3, 7 September 1981), and expresses its views, which are normally accepted in accordance with the principles in its Handbook.

III. ANY INTERPRETATION OF THE TERM "WELL-FOUNDED FEAR OF PERSECUTION" WHICH REQUIRES A SHOWING THAT THE APPLICANT IS MORE LIKELY THAN NOT TO BECOME THE VICTIM OF PERSECUTION OR WHICH DOES NOT TAKE DUE ACCOUNT OF THE DIFFICULTY OF PROOF INHERENT IN THE SPECIAL SITUATION IN WHICH AN APPLICANT FOR REFUGEE STATUS NORMALLY FINDS HIMSELF IS INCONSISTENT WITH THE INTERNATIONAL STANDARD ADOPTED BY CONGRESS.

1. To require the showing of a "clear probability of persecution" as the basis for a determination of refugee status, INS Brief at 25, could lead to results which would not be in conformity with the 1951 Convention and the 1967 Protocol.

The term "clear probability," as employed in various areas of the law, including statutory interpretation, *Utah Power and Light Co. v. Pfost*, 286 U.S. 165 (1932); criminal law, *United States v. Singleton*, 532 F.2d 199 (2d Cir 1976); *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir 1974), *cert. denied* 424 U.S. 917 (1976); antitrust, *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Cal. 1973), *reh. denied* 419 U.S. 886 (1974); torts, *Davis v. St. Louis Southwestern Ry. Co.*, 196 F. Supp. 547 (W.D. La. 1952); and of course, preliminary injunctive relief, *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), is generally taken to mean that the fact in question must be more than probably true, *i.e.*, more likely than not or established by the preponderance of the evidence. However, to require of an applicant for refugee status or for withholding of deportation to prove that persecution is "more likely than not" would result in a standard more stringent than the term "well-founded fear" as that phrase is used in the 1951 Convention. Moreover, the "clear probability" standard fails to take into account the subjective term "fear" which is a fundamental element of the refugee definition in the 1951 Convention and the 1967 Protocol.

According to the explanation adopted by the drafters, the term "well-founded fear of being persecuted" in Article I of the 1951 Convention means that an applicant for refugee status must be able to show good reason why he fears persecution.⁶² Under this definition, therefore, the objective circumstances must be evaluated with reference to an applicant's subjective fear of persecution in order to determine whether there is good reason for that fear. In other words, objective facts are relevant not to prove some particular degree of probability of persecution, but rather to establish whether or not the applicant's fear of being persecuted is justified and reasonable under the circumstances. To ignore the element of fear and to require an applicant to show that he would most probably be persecuted is to apply a definition of "refugee" which is not contained in or implied by the 1951 Convention or the 1967 Protocol, and which does not correctly reflect the obligations of a State Party under either of these instruments.

In using the term "well-founded fear of being persecuted," the framers of the 1951 Convention adopted a definition which corresponds to the practical realities of the refugee situation⁶³ and reflects the state of uncertainty and anxiety that often precipitates a refugee's decision to flee. *Fear*, rather than a certainty or "clear probability," of persecution is what makes a refugee unwilling to return to his country of origin, and "good reason" for that fear, rather than proof of a particular degree of probability of being persecuted, may be all that a refugee can show in support of his claim.

It would be inconsistent with the ordinary meaning of the words and contrary to human experience to assert that fear is not well-founded unless it is based upon a more than even chance that the event feared would actually come to pass. One

⁶² See pages 17-18, *supra*, Report, U.N. Doc. E/1618, Annex II, *supra*, at 39.

⁶³ "The phrase . . . expresses what was then considered to be the essential characteristic of a refugee." L. W. Holborn, *Refugees, A Problem of Our Times* 94 (1975).

authority on refugee law has proposed the following illustration of this idea:

. . . Let us for example presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote "labour camp" or that people are arrested and detained for an indefinite period on the slightest suspicion of political non-conformity. In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have a "well-founded fear of being persecuted" upon his eventual return. It cannot—and should not—be required that an applicant shall prove that the police have already knocked on his door.⁶⁴

While it appears from the Petitioner's brief that the "clear probability" standard in practice has been applied with some flexibility, it is apparent from some of the examples cited that the difference between a "clear probability" of persecution and a "well-founded fear of persecution" are by no means negligible. On the contrary, this difference is sufficiently great as to create a serious risk that the 1967 Protocol may not be complied with in those cases where the applicant is required to discharge an unduly high burden of proof. For example, one of the forms of evidence that would substantiate "clear probability" of persecution, according to the Petitioner, is "evidence of persecution of all or virtually all members of a group or class to which the alien belonged . . .".⁶⁵ Clearly, an applicant might have a well-founded fear of being persecuted long before "all or virtually all" of the members of his group had actually become the victims of persecution.

Because of the particular difficulties which persons who have been compelled to flee their countries of origin may have in producing evidence,⁶⁶ the imposition of a more stringent

⁶⁴ A. Grahl-Madsen, 1 *The Status of Refugees in International Law* 180 (Leyden, 1966).

⁶⁵ INS Brief at 9, 23 and notes 25 and 32.

⁶⁶ The refugee's difficulty in producing evidence was acknowledged sympathetically by the Board of Immigration Appeals in *In re Sihasdale*, 11 I.&N.Dec. 759, 762 (BIA, 1966), cited in INS Brief at 24-25.

standard than "well-founded fear" could result in the exclusion from refugee status of genuine refugees. While a refugee is normally able to present good reasons for fearing persecution in his country of origin, it is often unrealistic to expect him to demonstrate and prove the degree of probability of a hypothetical future event.

2. Traditionally, in United States law and practice, the standard of proof in legal proceedings has been adjusted to balance the interests of the state and the consequences to the individual of factual error. *In Re Winship*, 397 U.S. 358, 379 (1970). As Justice Harlan noted in *Winship*:

[A]s the standard of proof affects the comparative frequency of . . . erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative disutility of each.

Thus, in procedures for determining refugee status or withholding of deportation, the standard of proof should adequately reflect the potentially frightful consequences for the applicant of an erroneous determination as well as the difficulty he may have in proving them.

In summary, the "clear probability" standard should be disapproved⁶⁷ since it could lead to results which would not be consistent with the international standard accepted by the United States when it acceded to the 1967 Protocol and incorporated that standard into the Refugee Act of 1980. An act of Congress, moreover, "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *Accord*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1962).

⁶⁷ The UNHCR expresses no opinion on the merits on remand of Mr. Stevic's application for withholding of deportation.

CONCLUSION

For the foregoing reasons, the Office of the United Nations High Commissioner for Refugees would respectfully urge the Court to affirm the holding of the Court of Appeals that it would not be consistent with the 1967 Protocol as incorporated into United States law by the Refugee Act of 1980, to require applicants for refugee status to prove a clear probability of persecution.

The decision below should be affirmed on these grounds.

Respectfully submitted,

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August 29, 1983

APPENDIX I

From the International Refugee Organization, *Manual for Eligibility Officers*:

Chapter II, ¶ 3:

Documents and other evidence. It will be seen from the above that positive statements made by an applicant should where reasonably possible be supported by documentary evidence. If the applicant has no documents, then he should make an attempt to obtain them; if he has done so or if it is impossible to do so, and if his story is otherwise credible, he should be given the benefit of the doubt. The amount and type of evidence required in any particular case must be determined by the Eligibility Officer concerned; a sufficiently plausible story may be adequate, though some plausible stories, such as the burning of documents in the great air raids on Dresden, are sufficiently common to ring untrue. Therefore supporting evidence should be obtained where possible. Not only the applicant's history but also the reason for absence of the documents should be plausible.

Chapter IV, ¶ 19:

As regards objections derived from "persecution or fear, based on reasonable grounds, of persecution. . .", it is neither incumbent upon nor possible for the Organization to give its own independent and objective view about the conditions at present prevailing in some of the countries of origin of the Displaced Persons. Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to his religious or political convictions or to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling the Eligibility Officer cannot refuse to consider the objection as valid when it is plausible. As regards fear of persecution because of political opinions, the subsequent reference to the principles of the Preamble of the Charter of the United Nations is to be understood as ruling out any person whose fear of persecution is on account of his Nazi or Fascist convictions

or of his belief in similar regimes associated with Nazism during the war.

N.B. All citations omitted.

No. 82-973-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Predrag Stevic

Docketed:
December 10, 1982

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ritter, Ann L.

Entry	Date	Note	Proceedings and Orders
1	Oct 20 1982		Application for extension of time to file petition and order granting same until December 10, 1982 (Marshall, October 22, 1982).
2	Dec 10 1982	G	Petition for writ of certiorari filed.
4	Jan 12 1983		Order extending time to file response to petition until February 7, 1983.
5	Feb 7 1983		Brief of respondent Predrag Stevic in opposition filed.
6	Feb 9 1983		Brief amicus curiae of Lawyers Comm. For Intl. Human Rights filed.
7	Feb 9 1983		DISTRIBUTED. February 25, 1983
8	Feb 18 1983	X	Reply brief of petitioner filed.
9	Feb 19 1983		Lodging received.
12	Feb 28 1983		Petition GRANTED.
13	Mar 16 1983	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
14	Mar 21 1983		DISTRIBUTED. March 25, 1983. (Motion of petitioner to dispense with printing the joint appendix.)
15	Mar 28 1983		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
17	Apr 6 1983		Order extending time to file brief of petitioner on the merits until May 14, 1983.
18	Apr 22 1983		Record filed.
19	Apr 22 1983		Certified original record & C.A. proceedings received.
20	May 13 1983		Order further extending time to file brief of petitioner on the merits until May 28, 1983.
21	Jun 3 1983		Brief of petitioner filed.
23	Jun 24 1983		Order extending time to file brief of respondent on the merits until August 8, 1983.
24	Jul 25 1983		Order further extending time to file brief of respondent on the merits until August 29, 1983.
25	Aug 29 1983		Brief amicus curiae of American Immigration Lawyers Assn. filed.
26	Aug 29 1983		Brief amicus curiae of Natl. Immigration Project of the Natl. Lawyers Guild filed.
27	Aug 29 1983		Brief amicus curiae of Comm. on Migration and Refugee Affairs, et al. filed.
28	Aug 29 1983		Brief amicus curiae of Office of the U. N. High Commissioner for Refugees filed.
29	Aug 29 1983		Brief amicus curiae of Lawyers Comm. For Intl. Human Rights filed.
30	Aug 29 1983		Brief amicus curiae of American Jewish Comm., et al. filed.

No. 82-973-CFX

Entry	Date	Note	Proceedings and Orders
31	Aug 30 1983	Brief of respondent Predrag Stevic filed.	
32	Aug 29 1983	Brief amicus curiae of Amnesty International USA filed.	
33	Aug 29 1983	Brief amicus curiae of American Civil Liberties Union, et al. filed.	
34	Sep 21 1983	CIRCULATED.	
35	Oct 24 1983	SET FOR ARGUMENT. Tuesday, December 6, 1983. (3rd case) (1 hour)	
36	Nov 29 1983	X Reply brief of petitioner INS filed.	
37	Dec 6 1983	ARGUED.	